Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

WENDELL M. SIMMONS and LUCY SIMMONS,

Petitioners,

v.

SAFECO INSURANCE COMPANY OF AMERICA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Eleventh Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

SIDNEY W. JACKSON, III
R. JEFFREY PERLOFF
SCOTT E. DENSON
JACKSON, TAYLOR & MARTINO, P.C.
Post Office Box 894
Mobile, Alabama 36601
(334) 433-3131

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether a United States District Court's decision to strike down jury findings of bad faith failure to pay insurance benefits for public policy reasons violates the Seventh Amendment's Prohibition against Reexamination of any fact tried by jury other than according to the rules of the common law.

2. Whether a United States District Court's decision refusing to apply the common law of the State of Alabama regarding the law of Bad Faith, an insurer's liability for the wrongful acts of its agents, and the effect of waiver upon an insurer's duty to pay benefits violates the Rules of Decisions Act and the *Erie* Doctrine.

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PETITION FOR WRIT OF CERTIORARI

Wendell M. Simmons and Mona "Lucy" Simmons ("Simmonses") petition this Court for a writ of certiorari to review the judgment of the Eleventh Circuit Court of Appeals.

OPINIONS BELOW

The Petition for Rehearing by the Eleventh Circuit Court of Appeals was denied without opinion (Appendix ("App.") 35-36). The Opinion of the Eleventh Circuit Court of Appeals is reprinted at App. 1-6, and is unreported. The Order of the trial court granting the Simmonses' request for reconsideration and affirming its decision that Safeco was entitled to judgment as a matter of law is reprinted at App. 9, and is unreported. The Order of the trial court granting Safeco's motion for judgment as a matter of law on the bad faith claim is reprinted at App. 10-32, and is unreported.

JURISDICTION

The Eleventh Circuit Court of Appeals released its initial opinion and judgment in this case on July 11, 1996. The Simmonses filed a timely petition for rehearing and suggestion of rehearing *en banc*. On October 1, 1996, the Eleventh Circuit Court of Appeals denied the petition for rehearing and suggestion of rehearing *en banc*. This petition had been filed within 90 days of the release of

judgment on application for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Seventh Amendment to the United States Constitution provides in relevant part:

> In Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

II. 28 U.S.C. § 1652 provides that:

> The laws of the several States, . . . shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

A. Factual Background

Lucy and Wendell Simmons were divorced in October 1991. Tr. 377-498. After their divorce, Lucy continued to live part-time in the Monroeville home which remained titled in her ex-husband's name. Tr.377-78.

In February 1992, Lucy decided to consolidate all of her insurance, which included that on the Monroeville home, and therefore contacted the Harrigan Agency located next to her business by telephone. Tr.593. That

agency is owned by Carly Hinson and Kay Eddins. During this first telephone conversation, Lucy Simmons told her friend, Ms. Hinson, that because she and Wendell were now divorced and she had moved her interior decorating business to downtown Monroeville, she wanted to consolidate all of their insurance. She also specifically told Ms. Hinson that a prior insurance company would not renew their policy because Wendell had refused to erect a fence around the pool at the house. Tr.516. According to Lucy Simmons, Ms. Hinson responded by telling her that she did not think there would be a problem obtaining insurance for the Monroeville home. Tr.517.

On February 5, 1992, Lucy Simmons visited the Harrigan agency and spoke in person with Ms. Hinson about obtaining new homeowners coverage with Safeco. Tr.522. During or after this conversation, Ms. Hinson filled out and submitted to Safeco a "risk selection" questionnaire, considered by Safeco insurance to be an "application."

Importantly, Lucy Simmons was not allowed to read or sign the "questionnaire." Tr.269. Lucy testified she was not asked most of the questions and specifically was not asked question #7 about prior nonrenewals. Lucy did provide the Safeco agent with her prior insurance policy number and coverages, taken directly from the declarations page. This prior policy (Southern Guaranty) was specifically referred to on the Safeco "questionnaire."

During the ensuing months, Lucy Simmons submitted applications for automobile insurance on two vehicles which she owned. On both those ***signed*** applications, she wrote that she and Wendell had been divorced prior to

February 5, 1992. (App. 39-41). Both applications were submitted to Safeco via The Harrigan Agency.

In the summer of 1992, Lucy's washing machine overflowed and a claim was made with Safeco. Not only did Safeco pay the water damage claim, it *reviewed* the infamous "questionnaire" of February and found everything in order. Then, in September of 1992 Safeco wrote the Simmonses and informed them their house was undervalued and *upped* the coverage beginning the next policy year. These events coupled with the automobile applications which Lucy signed and which correctly stated Lucy and Wendell were divorced clearly allowed the jury to determine that Safeco WAIVED its right under Alabama law to use the "questionnaire" to avoid paying the claim.

On November 26, 1992, the Simmons home was destroyed by an arsonist's fire. During a prolonged investigation, Safeco hired an independent company named Inquisitor to do "background research" on the Simmonses. When this turned up nothing, Safeco turned its attention to the "questionnaire." Tr.691.

Safeco then repeatedly interviewed Lucy Simmons, who told its adjuster that she had informed Carly Hinson of her divorce and the fact that a previous insurer had refused to renew an insurance policy. However, she steadfastly denied speaking about the matter during the brief conversation held inside The Harrigan Agency. Furthermore, she denied having been asked the questions listed on the questionnaire, and did not even know that Ms. Hinson intended to complete or submit such a questionnaire, since she never saw it.

Safeco concluded that Lucy Simmons had made false statements relating to her marital status and insurance history for the purposes of obtaining insurance coverage, and that she had intentionally concealed or misrepresented material facts or circumstances about her prior insurance. It therefore denied her claim for insurance on the fire loss of November 26, 1996. Tr. 46.

The sole basis for Safeco's denial was the purported "fact" that Lucy Simmons had provided the information written by Carly Hinson on the questionnaire. However, it is undisputed that Lucy Simmons was never allowed to sign the questionnaire or review its contents. The only evidence available to support the claim that Ms. Hinson even asked the questions posed by that document is the disputed assertion by the Safeco agent and her business partner that she did so.

B. Proceedings in the Courts Below

On August 25, 1993, the Simmonses filed the instant lawsuit. They proceeded to trial on claims for breach of an insurance contract and for tortious bad faith failure to pay insurance benefits due. The parties testified to the factual matters described above. At the close of Simmonses' case-in-chief, Safeco moved for judgment as a matter of law, and the trial court denied that motion. (App. 35-36). Safeco subsequently renewed its motion for judgment as a matter of law, and that renewal was again denied. (App. 35-36).

The court charged the jury on the law applying to the Simmonses' contract claims.

The trial court ruled that the jury should consider Carly Hinson and Kay Eddins general agents for Safeco as a matter of law. Tr. 1032-33. The Court further informed the jury that, because Carly Hinson was an agent of Safeco, her knowledge and acts were binding on Safeco. It charged the jurors on the law of waiver, informing them that if they believed that Lucy Simmons at any time prior to the fire advised Safeco of the true facts concerning her marital status and prior insurance nonrenewal, Safeco would be barred from raising misrepresentation on the "application" as a defense to the Simmonses' claims. Waiver would also apply if Safeco knew or should have known of errors on the application. Tr. 1035-38.

Finally, the Court charged the jurors on the law of bad faith, instructing them that Safeco could only be held liable on this count if the jury found that Safeco intentionally refused to pay the Simmonses' claim, all the while knowing that it had no reasonably legitimate, arguable or debatable reason for that refusal to pay. Tr.1032-1041.

The jury returned a verdict in favor of the Simmonses, awarding $271,720 in compensatory damages for Safeco's breach of contract, and $2,000,000 in punitive damages for its bad faith failure to pay insurance benefits due. (App. 37-38).

Safeco filed post trial motions including a JNOV. The trial court found that a genuine dispute existed concerning "the information that was given by Lucy Simmons to Safeco's agent, Carly Hinson, relating to whether the Simmonses had been nonrenewed by a prior insurer." The court concluded, therefore, that no reasonable juror

could have found that Safeco lacked a reasonably debatable reason for refusing to pay the Simmonses' claim and granted the motion for JNOV. (App. 27, 31).

On motion for reconsideration, the Simmonses contended that the trial judge had ignored Alabama law on the elements of a *prima facie* case of bad faith. They also presented additional law from the Alabama Supreme Court holding that the question of bad faith was a question of fact for jury determination when the sole reason for denial arises from a purported conversation between the insurer and insured. The Simmonses pointed out that the entire order presupposed that Lucy Simmons was asked question 7, a finding disputed by Ms. Simmons and rejected by the jury.

The Simmonses argued on appeal that the trial court had invaded the province of the jury by making its own findings of fact, and that its ruling was contrary to settled Alabama law on the issues of bad faith and waiver.

The Eleventh Circuit Court of Appeals, like the trial court before it, found that an arguable reason existed for Safeco to refuse to pay the Simmonses' claim, and held that Alabama law would not permit a reasonable jury to find Safeco liable for bad faith failure to pay. (App. 5-6). The Simmonses moved for reconsideration, focusing their arguments on the Circuit Court's violation of the *Erie* Doctrine by refusing to apply settled Alabama law to the facts before it.

REASONS FOR GRANTING THE WRIT

A. The Court should grant plenary review to decide whether the District Court, in setting aside the jury verdict as to bad faith failure to pay insurance benefits due, violated the Seventh Amendment.

This case presents important and substantial questions of law relating to constitutional limitations on a trial court's right to set aside a jury verdict. The Seventh Amendment to the Constitution provides for jury trial of all facts as a fundamental right, and in its "reexamination clause" states that once a jury reaches a finding of fact, the district court cannot reexamine that fact except according to the rules of the common law. U.S.Const. Amend. VII. In the words of Justice Douglas, "[n]either we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can redetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' " *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59 (1962).

Review of this case will demonstrate to the District Court that it cannot substitute its "opinion" for the jury's specific factual finding. For public policy reasons the court reexamined those factual findings in order to set aside the jury's verdict "as a matter of law," and did so at variance with the rules of the common law. The Eleventh Circuit Court of Appeals endorsed this constitutional violation. Finally, the District Court's constitutionally-prohibited acts impermissibly extend the power of the trial

court beyond the sphere of law and undermine the reexamination clause of the Seventh Amendment.

1. Review of this case will demonstrate that the district court impermissibly reexamined the factual findings upon which the jury had based its verdict in order to set aside that verdict "as a matter of law" for public policy reasons.

The jury, having heard the evidence and having been properly instructed on the law, found that Safeco had refused to pay the Simmonses' claim for benefits in bad faith. It thereupon rendered its verdict on that count in the sum of $2,000,000.

At hearing on post-trial motions, the court recognized that the central dispute in the case involved the question of whether Safeco's agents had asked Lucy Simmons about her marital status or non-renewal history. (App. 46). Speaking to Safeco, the judge stated:

> But as I say, the problem that I see is the problem that the jury made the determination that Ms. Simmons told – well, not only did they make the decision she told the truth, but under their finding, Ms. Simmons did tell the truth. And these ladies misrepresented to the company or misrepresented to their superiors that they had asked this question when, in fact, they had not asked the question.
>
> **I'm not saying that's what happened, that's what the jury found.** And that's where we get into whether or not this is an extraordinary

> case.[1] With the **attitude**, I think, of the Appellate Courts, I think you have an excellent chance in the case in having them take a different view of it. (Emphasis added)
>
> I practiced law for thirty years, Mr. Hart, and I defended cases for that entire time and only had about two or three plaintiff's cases. And I'm not – I'm not what I considered plaintiff oriented, but I'm a trial lawyer and a jury trial lawyer. And when the jury speaks, that's what I follow. (App. 51-52). (Emphasis added)

Although the judge recognized that he was required to follow the jury's findings of fact, he also indicated his reservations about those findings:

> I simply have taken the position that the jury makes the decision as to whether or not the question was asked. And the jury decided the question was not asked. Now, I am not to say I would have made the same decision

---

[1] Under Alabama law, an "extraordinary" bad faith failure to pay case is one in which the jury is permitted to determine whether the insurer has acted in bad faith notwithstanding the fact that the insured is not entitled to a directed verdict on its breach of contract claim. *E.g., Jones v. Alabama Farm Bureau Mut. Cas. Co.*, 507 So.2d 396 (Ala. 1986) (holding that "[p]recluding a plaintiff's bad faith action by application of the "directed verdict on the contract claim" test when the disputed factual issue arises solely from a contradicted oral conversation between the insurer and the insured or a third person puts too onerous a burden on the plaintiff. Moreover, it would frustrate the purpose of the bad faith action by allowing an insurer simply to misinterpret the content of an oral conversation to avoid liability.").

(App. 46). Moreover, the judge had two other concerns. First, he disagreed with the size of the verdict. (App. 50). Second, the trial court feared the impact of holding an insurer liable merely because its agents fabricated answers to a supposed questionnaire and lied to the claims department when asked whether those answers were in fact given by the insured, notwithstanding the fact that the agents' acts of bad faith would be used to void coverage under the policy. In the words of the court:

> But assuming that these are agents of the company, which we have done, and they ask these agents did Ms. So-and-So advise you that she was – she answered this question, and they say, yes, she did, it puts the insurance company and the claims department in very precarious position. They cannot accept the words of anyone when there is an issue by an insured saying, I did say this or I did not say this, and the agent is saying they did, so the insurance company no longer can deny the claim in good faith. It puts them in a very precarious position.
>
> * * *
>
> And what can they do to determine whether that claim can be paid? They can make an investigation. Can they – the finding of the jury and the judgment of this Court, as I see it, raises this specter: The insurance company can no longer accept the word of any its departments or any of its agents in any case where the insured disagrees with the agent or has anyone else that disagrees with the agent.
>
> Now, I see no bad faith on the part of the claims department in denying the claim based

> on the fact that they relied on their agents. Not only did they have one agent, but the other agent said, yes, I was sitting there and I heard this conversation.
>
> To require them to pay the claim would mean the agency – or excuse me, the claims department would have to say to the agents, we don't believe you, and even if we did believe you, we can't accept that, and from now on if the question is asked, all the insured has to do is to refuse to pay. (App. 56-58).

Under the law as explained by the trial court, the jury returned a verdict in favor of the Simmonses on their bad faith claim. In doing so, the jury found either that the Safeco agent never asked the questions on the questionnaire which she later submitted to Safeco, or that Lucy Simmons had in fact provided information regarding nonrenewal and marital status to Safeco or its agent (and that the insurer had waived its right to act on such information). Nevertheless, the District Court was concerned with the size of the verdict. It was also concerned by the commercial impact that a finding of bad faith under these facts would have upon the insurance industry in this State of Alabama. It ultimately resolved this quandary by holding (notwithstanding its original rulings on summary judgment, judgment as a matter of law, and renewed judgment as a matter of law) that no facts had been presented upon which a reasonable jury could find that Safeco was guilty of bad faith.

To hold that Safeco had a debatable reason for denying payment, the Court reexamined the testimony of several defense witnesses heard and obviously discounted by the jury – and decided as a matter of fact that Safeco

could reasonably believe that Lucy Simmons had provided the erroneous information contained in the questionnaire. The court also found that, even were its misrepresentation defense unfounded, Safeco could not have been aware of that fact. (App. 26-30).

The District Court had charged the jury that Carly Hinson and Kay Eddins were Safeco agents, and that the insurer could be charged with their knowledge and wrongful acts. Thus, the jury was entitled to find that because the agents knew no debatable reason existed to deny the Simmonses' claims, Safeco knew the denial was unfounded. Tr.1035-38. If the jury found that Ms. Hinson did not ask about Lucy Simmons' marital status or insurance history, or found that she was properly informed as to those matters, it was entitled to find that Safeco knowingly denied benefits without any debatable reason. The trial court's impermissible reexamination of the jury's findings, combined with its inexplicable failure to consider the law and facts supporting those findings, supports the conclusion that the constitutional violation presented here was results-driven rather than a mere accident.

2. The Eleventh Circuit Court of Appeals endorsed the constitutional violation committed by the District Court.

As prophesied by the trial judge, the Eleventh Circuit Court of Appeals chose not to uphold the jury's $2,000,000 verdict. Rather, it effectively rubber-stamped the trial court's decision by hewing to the same line of "facts" rejected by the jury. In brief, the Circuit Court

held that because Safeco learned that Lucy Simmons knew that she was supposed to be nonrenewed by her previous insurer, it could have inferred that she had a motive to conceal this information from its agent, and that she may have acted on that motive as a result. The lower appellate court held that no reasonable juror could find that Safeco lacked a debatable reason to deny the claim. (App. 5-6).

The Circuit Court simply ignored the fact that the knowledge possessed and wrongful acts committed by Hinson were to be imputed to Safeco as her principal, and that the jury could find Safeco liable for *her* knowledge that it lacked no debatable reason to deny the claim. Furthermore, it flatly refused to address the Simmonses' argument on waiver. (App. 6, n.1). It refused oral argument. (App. 6, n.2).

The jury found that Safeco had knowingly denied the Simmonses' claim without any arguable reason. Dissatisfied with the size of the verdict and the legal implications of such a determination, the District Court revisited the facts to hold that a debatable reason *did* exist for the denial. It repudiated the factual findings of the jury and ignored the law of the case. The Eleventh Circuit endorsed this Seventh Amendment violation, and thereby so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

This Court should grant plenary review to determine whether the facts tried to the jury were reexamined other than according to the common law in violation of the Seventh Amendment, and to provide further guidance on

the scope of review available to the trial court under Federal Rule of Civil Procedure 50.

B. The Court Should Grant Plenary Review to Decide Whether the District Court Violated the Rules of Decisions Act and the *Erie* Doctrine When it Set Aside the Jury's Verdict that Safeco Had Refused to Pay Insurance Benefits Due Without Any Debatable Reason.

1. The Rules of Decisions Act and the *Erie* Doctrine require district courts to apply the substantive law of the States in which they sit in cases arising under Federal diversity jurisdiction.

The Simmonses brought state-law claims for breach of contract and bad faith in federal court on the basis of diversity jurisdiction. While diversity jurisdiction provides a forum for adjudication of state-law claims, it does not enable the federal court to generate new rules of substantive law. *Gasperini v. Center for Humanities, Inc.*, 517 U.S. ___, ___, 116 S.Ct. 2211, 2219 (1996). Instead, wherever a dispute arises under State law, that law is regarded as the rule of decision in a federal court trial. 28 U.S.C. § 1652. "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). The purposes of the *Erie* Doctrine are two-fold: "discouragement of forum-shopping and avoidance of inequitable

administration of the law." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Prior to *Erie*, federal courts construed the first phrase of the Rules of Decisions Act (then § 34 of the Federal Judiciary Act of September 24, 1789, c.20, 28 U.S.C. § 725) to require adherence only to State statutory law; the courts therefore supplemented their diversity jurisdiction by deciding such cases in keeping with a body of federal common law decisions termed "general law." One of the most serious evils resulting from the federal courts' assumed authority to establish law in conflict with state common law but not state statute was that federal judges regularly ignored State common law with which they disagreed. In the words of Justice Field as quoted by Justice Brandeis in *Erie*: "I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views." 304 U.S. at 78.

That is precisely what happened in this case.

2. The district court refused to apply the common law of the State of Alabama when it set aside the jury verdict below.

In order to prove their claims of bad faith, the Simmonses were required to show (1) an insurance contract; (2) Safeco's intentional refusal to pay their claims; (3) "the absence of any reasonably legitimate or arguable reason for that refusal"; and (4) Safeco's actual knowledge that it had no legitimate or arguable reason for the denial. *E.g., Adams v. Auto Owners Ins. Co.*, 655 So.2d 969, 971 (Ala. 1995).

The District Court cited and followed the foregoing law. The Eleventh Circuit did likewise. However, both courts refused to apply established Alabama common and statutory law on the issues of agency, waiver, and submission of the question of bad faith to the jury as an issue of fact.

Under Alabama law, both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence to communicate to the other. Alabama Code § 8-2-8 (1975); *accord, National Sec. Fire & Cas. Co. v. Hester*, 292 Ala. 592, 298 So.2d 236 (1974); *Tennesse Val. Bank v. Williams*, 246 Ala. 563, 21 So.2d 686 (1945). Thus, if Lucy Simmons informed Ms. Hinson by telephone that she had been nonrenewed by a prior insurer, Safeco would be charged with that knowledge, and would have no debatable reason for refusing her claims after subsequently issuing and receiving payments on the policy.

Where an insurer receives information, either before or after the purported misrepresentation of the insured, which either directly corrects the misrepresentation or would lead to its correction if properly investigated, the failure to undertake a proper investigation deprives the insurer of the right to rely upon that misrepresentation as a defense to payment. *E.g., Miller v. Dobbs Mobile Bay*, 661 So.2d at 206, 207; *First Financial Ins. Co., v. Tillery*, 626 So.2d 1252, 1256 (Ala. 1993); *Bankers Life & Cas. Co., v. Long*, 345 So.2d 1321, 1323 (Ala. 1977).

Furthermore, under Alabama law, "an insurance company cannot defend its refusal to pay benefits on grounds that the insured made a misrepresentation in the

application if the misrepresentation was the fault of the agent and that fault was without participation by the insured. *E.g., Miller*, 661 at 206; *accord, National Life & Acc. Ins. Co., v. Allen*, 285 Ala. 551, 234 So.2d 567 (1970); *Coastal States Life Ins. Co., v. Leonard*, 279 Ala. 171, 182 So.2d 913 (1966).

Finally, where the insurer's denial is based on the contents of a disputed oral conversation between its agent and the insured, the question of whether the denial constitutes bad faith is a question of fact for the jury. *See, e.g., Jones*, 507 So.2d at 401 (stating rule); *See also, Miller*, 661 So.2d at 206-207 (applying rule); *Tillery*, 626 So.2d at 1254-55, 1255n.2, 1256 (applying rule).

The Simmonses argued each of these rules of law at every stage of the proceedings below. While the trial court adopted Alabama's general law of bad faith, it refused to apply the State's common law regarding agency, waiver, and submission of bad faith to the jury as a fact issue. The Eleventh Circuit not only refused to apply the law, but refused even to comment upon it.

The decisions below are unreported. Nevertheless, they may be – and will be – cited as persuasive authority. They establish a new federal common law rule that, wherever an insurer relies upon its agent's assertions that an insured made certain oral misrepresentations when applying for insurance, that insurer cannot be held liable for bad faith failure to pay insurance benefits due. Whatever test is applied, the new rule contradicts both the Rules of Decisions Act and *Erie*. Contrary to the test propounded by *Guaranty Trust Co., v. York*, 326 U.S. 99

(1945), the Federal Court's disregard of controlling Alabama law would significantly affect the result of the litigation. Likewise, the new rule both encourages forum-shopping and causes "inequitable administration of the laws" between federal and state courts. *Hanna*, 380 U.S. at 468.

3. The courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers in a matter of great public importance.

The District Court revisited the factual findings of the jury in violation of the Seventh Amendment. It ignored the Rules of Decisions Act and the *Erie* Doctrine. Disfavoring the results of a proper application of Alabama statutory and common law, it selectively applied Alabama law to establish a federal common law of bad faith failure to pay insurance benefits. It failed to apply, address, or distinguish controlling Alabama law on the issues of agency, waiver and submission of the question of bad faith to the jury as a matter of fact.

The Eleventh Circuit not only ignored these departures from judicial procedure, it endorsed them. The Circuit Court made the same factual findings, applied the same limited rules of law, and explicitly refused to review the Simmonses' *Erie* arguments.

The Court should grant the writ to ascertain whether the courts below violated the Rules of Decisions Act and the *Erie* Doctrine.

CONCLUSION

The Petition for Writ of Certiorari should be granted and the case set for plenary consideration.

Respectfully submitted,

JACKSON, TAYLOR & MARTINO, P.C.
Attorneys for the Plaintiff,

SIDNEY W. JACKSON, III
R. JEFFREY PERLOFF
SCOTT E. DENSON
Post Office Box 894
Mobile, Alabama 36601
PH: 334/433-3131

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DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6473
Non-Argument Calendar

D. C. Docket No. CV-93-00704-RV-S

WENDELL M. SIMMONS, and
MONA SIMMONS a/k/a MONA "LUCY" SIMMONS,

Plaintiffs-Counter-Defendants-Appellants,

versus

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Counter-Claimant-Appellee,

GREAT SOUTHERN WOOD PRESERVING, INC.

Movant.

Appeal from the United States District Court
for the Southern District of Alabama

(July 11, 1996)

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

PER CURIAM:

In this diversity case involving Alabama law, the sole issue on appeal is whether the district court correctly

granted judgment as a matter of law to the Safeco Insurance Company ("Safeco") on appellants' "bad faith refusal to pay" tort claim. We affirm.

FACTS

Wendell and Lucy Simmons divorced in 1991. After the divorce, they continued to share a house located in Monroe County, Alabama. On November 26, 1992, a fire completely destroyed the house. The Simmonses filed a loss claim with Safeco, their homeowners' insurer.

During the investigation of the loss, Safeco contacted the Southern Guaranty Insurance Company ("Southern Guaranty"), the insurer of the Simmonses' home until January 10, 1992. Southern Guaranty informed Safeco that it declined to renew the Simmonses' policy because of bad credit.

Safeco also contacted the Harrigan Insurance Agency, the insurance agency that arranged for the Simmonses to insure their home through Safeco. Safeco learned that Lucy Simmons applied for homeowners' insurance at the Harrigan Insurance Agency on February 5, 1992. Carlie Henson, one of the agents, asked Lucy Simmons several questions, and Kay Eddins, another agent, overheard portions of the conversation. Either during or immediately following the conversation, Henson completed a "risk selection questionnaire." Although Simmons neither reviewed nor signed this questionnaire, Safeco treated it as an application for insurance and relied on the information contained therein. On the questionnaire, Carlie Henson recorded Simmons' prior insurance carrier as Southern Guaranty and included the number of the

Southern Guaranty policy. Henson wrote "no" in response to the following question: "Has any company canceled, declined, or refused to renew similar insurance to the insured within the past 5 years?" Henson told Safeco that she asked Lucy Simmons this specific question, and that Simmons responded negatively. Eddins said that she heard Henson ask the question, and heard Lucy Simmons' negative response.

At trial, Lucy Simmons conceded that the answer to the nonrenewal question on the risk selection questionnaire was incorrect, and she also acknowledged that she had bad credit at the time of Southern Guaranty's nonrenewal. However, she maintains that Henson never asked her whether Southern Guaranty had declined to renew her homeowners' insurance.

By a letter dated May 7, 1993, Safeco denied the Simmonses' fire loss claim, and rescinded the insurance policy. The letter informed the Simmonses that the denial and rescission were based on Safeco's determination that Lucy Simmons had misrepresented a material fact – that no prior insurance carrier had cancelled, declined, or refused to renew homeowners' insurance coverage to the Simmonses – when applying for the Safeco policy. Had Safeco known about the prior nonrenewal due to bad credit problems, Safeco would not have issued the policy.

On August 25, 1993, the Simmonses filed the instant lawsuit. They proceeded to trial on a breach of contract claim, and a "bad faith refusal to pay" tort claim. The jury returned a general verdict in favor of appellants on both claims – awarding $271,720 in compensatory damages for

the breach of contract claim and $2,000,000 in punitive damages on the bad faith claim.

Upon a post-trial motion by Safeco, the district court set aside the jury's verdict on the bad faith claim and entered judgment as a matter of law to Safeco. The court ordered that the jury's verdict on the breach of contract claim remain in full force and effect. The Simmonses filed this appeal, contending that the jury's verdict on the bad faith claim should be reinstated.

ANALYSIS

We review a motion for a judgment as a matter of law de novo, applying the same standard that the district court applied when deciding whether to grant the motion. *Sherrin v. Northwestern Nat'l Life Ins. Co.*, 2 F.3d 373, 377 (11th Cir. 1993). When considering a motion for judgment as a matter of law, we view the evidence in the light most favorable to the non-moving party. *See Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). "If the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict, then the motion was properly granted." *Id.*

Under Alabama law, an insurer may be held liable for bad faith when it refuses to pay a claim, has no lawful basis for the refusal, and has actual knowledge of that fact. *Turner v. State Farm Fire & Cas. Co.*, 614 So.2d 1029 (Ala. 1993); *National Security Fire & Cas. Co. v. Bowen*, 417 So.2d 179, 183 (Ala. 1982). The plaintiff in a bad faith refusal case carries a heavy burden, and must prove the following:

(a) an insurance contract between the parties and a breach thereof by the defendant;

(b) an intentional refusal to pay the insured's claim;

(c) the absence of any reasonably legitimate, debatable, or arguable reason for that refusal; and

(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason.

See Bowen, 417 So.2d at 183. "In short, plaintiff must go beyond a mere showing of nonpayment and prove a *bad faith* nonpayment, a nonpayment without any reasonable ground for dispute." *Id.* "When a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *National Sav. Life Ins. Co. v. Dutton*, 419 So.2d 1357, 1361 (Ala. 1982) (quoting *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916 (Ala. 1981)).

In this case, the evidence at trial revealed an "arguable" reason for Safeco's refusal to pay the claim – it appeared that Lucy Simmons gave materially false information to Safeco when applying for the homeowners' insurance policy. On the risk selection questionnaire that was completed when Lucy Simmons applied for the Safeco policy, Carlie Henson wrote that no prior insurer had ever declined to renew the Simmonses' homeowners' insurance. This information was false, because Southern Guaranty did, in fact, decline to renew the Simmonses' homeowners' insurance. Carlie Henson and Kay Eddins both told Safeco that Simmons answered in the negative when asked the question about prior nonrenewals.

Even if the jury believed Lucy Simmons' testimony that Henson never asked her the non-renewal question, no reasonable jurors could conclude that Safeco had

actual knowledge that its reason for denying the claim was not at least "arguable." In addition to relying on the statements of Henson and Eddins, Safeco spoke to Randy McDonald, a representative of Southern Guaranty. McDonald stated that he informed Lucy Simmons that her homeowners' insurance would not be renewed due to bad credit. The Southern Guaranty policy expired on January 10, 1992 – approximately three weeks before Lucy Simmons applied for the Safeco policy. Safeco could have inferred that Lucy Simmons, at the time she applied for insurance with Safeco, knew the reason that Southern Guaranty declined to renew her homeowners' policy. Safeco also could have inferred that Simmons had a motive to conceal this information from Safeco, and that she may have acted on this motive. All of the information gathered by Safeco during its investigation provided it with an arguable reason to deny the claim.

Therefore, we agree with the district court's conclusion that Safeco is entitled to judgment as a matter of law on the bad faith claim.[1]

AFFIRMED.[2]

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[1] Appellants also make the following arguments in favor of reversal: (1) that Safeco waived its right to rely on the information contained in the risk selection questionnaire as a basis for denying the claim; (2) that the merger clause in the insurance contract barred Safeco from relying on the risk selection questionnaire in denying the claim; and (3) that Wendell Simmons is an "innocent co-insured" and thus entitled to recover on the bad faith claim. We find that the foregoing arguments are without merit and warrant no discussion.

[2] Appellants' request for oral argument is DENIED.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 95-6473
Non-Argument Calendar

District Court Docket No. CV-93-00704

WENDELL M. SIMMONS, and
MONA SIMMONS a/k/a MONA "LUCY" SIMMONS,

Plaintiffs-Counter-Defendants-Appellants,

versus

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Counter-Claimant-Appellee,

GREAT SOUTHERN WOOD PRESERVING, INC.,

Movant.

Appeal from the United States District Court
for the Southern District of Alabama

(Filed Jul. 11, 1996)

Before TJOFLAT, Chief Judge, HATCHETT and ANDERSON, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-counter-defendants-appellants pay to defendant-counter-claimant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: July 11, 1996
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNoll
Deputy Clerk

ISSUED AS MANDATE: 10/9/96

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WENDELL M. SIMMONS and MONA "LUCY" SIMMONS,	:	
Plaintiffs,	:	**CIVIL ACTION NO. 93-0704-RV-S**
V.	:	
SAFECO INSURANCE COMPANY OF AMERICA,	:	(Filed Jun. 9, 1995)
Defendant.	:	

ORDER

This matter is before the court on plaintiff's "motion to reconsider order of May 12, 1995, on the basis of recent Alabama law." After due and proper consideration, the court concludes that the request for reconsideration is due to be, and hereby is, **GRANTED**. On reconsideration, the court again concludes that the defendant is entitled to a judgment as a matter of law on the bad faith claim for the reasons set forth in the court's May 12, 1995, order.

DONE this the 9 day of June, 1995.

/s/ Richard W. Vollmer, Jr.
UNITED STATES DISTRICT JUDGE

FILE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WENDELL M. SIMMONS and MONA "LUCY" SIMMONS,	:	
Plaintiffs,	:	CIVIL ACTION NO. 93-0704-RV-S
V.	:	
SAFECO INSURANCE COMPANY OF AMERICA,	:	(Filed May 12, 1995)
Defendant.	:	

ORDER

This matter is before the court on a number of post-trial motions. By those motions, the defendant requests the following relief: (a) a new trial based on juror misconduct; (b) a judgment as a matter of law on the bad faith claim; (c) a new trial on the breach of contract and/or bad faith claims; or (c) a remittitur of the punitive damages award.

The court has held oral argument on the pending motions twice and reviewed the parties' extensive briefs on the issues raised. Having done so, the court concludes that only one issue merits lengthy discussion: Is Safeco entitled to a judgment as a matter of law on the bad faith claim?[1] As will be discussed, the court believes that

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[1] Several of the defendant's motions address the juror misconduct issue. *See* defendant's "supplemental motion for new trial" (tab 67); "memorandum brief by defendant in

Safeco is entitled to relief on that issue on the basis that the plaintiffs failed to prove one or more essential elements of their bad faith claim by a preponderance of the evidence.[2]

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support of post-trial motions" (tab 72); "motion for evidentiary hearing" (tab 74); "response to court order" (tab 75); "notice of filing of the affidavit of Barre C. Dumas" (tab 84); and "supplemental memorandum brief by defendant in support of motion for new trial" (tab 85). At the second hearing on the post-trial motions, defendant withdrew its request for an evidentiary hearing on the issue and asked the court to rule based on the present record. Based on that record, the court concludes that the defendant failed to prove its entitlement to relief on this issue. Even assuming that the two jurors in question failed to answer honestly one question on the juror questionnaires (which questionnaires, incidentally, were completed by the prospective jurors well in advance of jury selection and without knowledge on their part that they might serve as jurors on this case), there is nothing in the record to suggest actual bias on the part of either one of them. *See, e.g., United States v. Perkins*, 748 F.2d 1519, 1532-33 (11th Cir. 1984).

In its various post-trial motions, the defendant maintains that the court erroneously instructed the jury on waiver, misrepresentation, and agency. The court believes that its waiver and misrepresentation instructions were proper. With respect to agency, the court also believes that its charge was proper (*i.e.*, the instruction that Kay Eddins and Carlie Henson were Safeco's agents as a matter of law) considering that agency was not preserved as a triable issue by the defendant. The court also notes, in response to the defendant's contention that the evidence presented at trial did not support the compensatory damages awarded under the breach of contract claim, that there was sufficient evidence to support that aspect of the monetary award.

[2] In light of the court's disposition of this issue, the court declines to address the defendant's request for remittitur or contention that the plaintiffs failed to prove their entitlement to

Background

The facts of this case.can be summarized as follows.[3] In early 1992, the plaintiffs, Lucy and Wendell Simmons, were divorced from each other but living together in a home located in Monroe County, Alabama. Prior to February 1992, the home was insured under a homeowners' policy issued by Southern Guaranty Insurance Company ("Southern Guaranty"). Southern Guaranty declined to renew the insurance policy when it came up for renewal in February because of the Simmons's bad credit.[4] Southern Guaranty mailed a written nonrenewal notice to

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punitive damages by clear and convincing evidence. The following motions, therefore, are MOOT as they relate to those issues: defendant's "renewed motion for judgment as a matter of law or, in the alternative, motion for new trial or, in the alternative, motion for remittitur" (tab 65), plaintiffs' "motion in opposition to defendant's motion for JNOV, new trial, and/or remittitur" (tab 76; *see also* tab 77), defendant's "amendment to motion for JNOV, new trial, and remittitur" (tab 79), defendant's "motion to strike affidavit of John R. Shields" (tab 81), defendant's "motion to strike affidavit of Robert W. Osborne, Jr." (tab 82), and defendant's "supplemental filings and brief in support of motions for judgment notwithstanding the verdict, new trial, or remittitur" (tab 88).

[3] The trial transcript consumes more than 1000 pages and contains voluminous testimony that is not directly relevant to the issues at hand. The court, therefore, shall only summarize the relevant testimony.

[4] Ruth Noell is the Southern Guaranty underwriter who made the decision not to renew the Simmons's homeowners' insurance policy. She testified via deposition at trial that she made the decision not to renew the policy after receiving a copy of a bankruptcy notice and verifying the bankruptcy information with a credit bureau.

the Simmons at their home address on or about November 26, 1991. The notice was mailed in accordance with Southern Guaranty's ordinary and regular course of mailing and was not returned by the postal service, undelivered. Randy McDonald, the soliciting agent through whom the Southern Guaranty policy had been placed, testified that he also provided Lucy Simmons with notice of Southern Guaranty's decision.[5]

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[5] Randy McDonald received a copy of Southern Guaranty's nonrenewal notice. The notice was dated November 26, 1991, and was effective when the policy expired on January 10, 1992.

McDonald testified that he telephoned Lucy Simmons two or three time to discuss the reason for the nonrenewal with her. According to McDonald, the first time they spoke, Lucy Simmons said that the credit bureau information may have disclosed a possible foreclosure of the property by Federal Land Bank because there had been some problems with that mortgage. Ultimately, McDonald went to Lucy Simmons's place of business around January 10, 1992. He informed Lucy Simmons that the Southern Guaranty policy would not be renewed and that she needed to obtain insurance coverage from another agency because he did not have any other insurers who would write the business.

Lucy Simmons testified that her secretary told her that the Southern Guaranty policy was coming up for renewal. She denied that she was aware that the Southern Guaranty policy had expired at the time the Safeco application was taken. She admitted, however, that her secretary may have attempted to obtain coverage during the gap between the expiration of the Southern Guaranty policy and the date on which the Safeco application was taken.

Wendell Simmons testified that he never saw the Southern Guaranty nonrenewal notice, even though it was mailed to him at his home address.

On or about February 5, 1992, Lucy Simmons, acting on behalf of herself and Wendell. Simmons,[6] went to a

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[6] At trial, the court charged the jury that Lucy Simmons was Wendell Simmons's agent for purposes of procuring the Safeco homeowners' insurance policy. That charge was supported by Wendell Simmons's testimony:

Q: During your married life, you've always relied on your wife to handle insurance for you; is that right?

A: I relied on Lucy to handle insurance for me.

* * *

Q: Did [Lucy] also assist in taking out homeowners insurance for you, taking care of homeowners insurance?

A: She took care of all the insurance.

Q: Did she have your permission to obtain homeowners coverage for you?

A: She had my permission to do it that, yes, sir.

* * *

Q: Did she have your permission to meet with insurance agents to obtain homeowners coverage?

A: I just told her to get the insurance. I knew I had to have insurance. I told her to handle it. I don't know what she did. I assume she had to meet with them. She had my permission to handle the insurance.

Q: Whatever needed to be done to obtain the insurance, she had your permission to?

A: True.

Q: You relied on Lucy Simmons to obtain your insurance coverage even after your divorce; is that correct?

Q: That's correct.

local independent insurance agency run by Carlie Henson and Kay Eddins (the Harrigan Insurance Agency) and applied for homeowners' insurance coverage on the Monroe County home. Carlie Henson[7] and Lucy Simmons briefly discussed Lucy's request. Kay Eddins was seated in the same room as Carlie Henson and Lucy Simmons at the time. At trial, Kay Eddins testified that she overheard portions of the conversation between Carlie Henson and Lucy Simmons and, in fact, participated in it.

Either during or immediately following the conversation between Carlie Henson and Lucy Simmons, Carlie

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* * *

Q: You relied on Lucy Simmons to do whatever needed to be done to get the homeowners coverage?

A: Yes, sir.

* * *

Q: Did you ever place any restriction on Lucy about taking out homeowners coverage?

A: No. I knew Lucy would just, you know, she's always trying to pinch pennies and I just assumed that she would do the best job she could.

Q: And she had your permission to do whatever was necessary to obtain the homeowners coverage; is that right, Mr. Simmons?

A: Yes.

Trial Transcript at pages 380, 382, 384.

[7] At trial, the court instructed the jury that Carlie Henson and Kay Eddins were Safeco's agents as a matter of law. That is so because, as noted *supra* at footnote 1, Safeco failed to preserve agency as a triable issue.

completed a "risk selection questionnaire," which effectively was an application for a Safeco homeowners' insurance policy. Lucy Simmons testified that Carlie Henson may have filled out the application while the two were talking; however, the application was never signed by Lucy and apparently was never reviewed by her. The application contained information about Lucy Simmons's marital status and prior homeowners' insurance coverage, among other things. Carlie Henson incorrectly noted Lucy's marital status as married. She recorded Lucy's prior insurance carrier as Southern Guaranty and included the number of Lucy's Southern Guaranty policy. Most important to this case, Carlie Henson answered "no" to the following question: "Has any company canceled, declined, or refused to renew similar insurance to the insured within the past 5 years?"

Lucy Simmons testified that Carlie Henson never asked her about prior insurance declinations, cancellations, refusals, or nonrenewals. Lucy said she and Carlie discussed the fact that Lucy's prior insurance carrier was going to require the Simmons's to build a fence around a swimming pool located on the Monroe County property and that the Simmons were not agreeable to that condition. Lucy also said she told Carlie that she, Lucy, wanted to place all of her insurance policies with one carrier in order to simplify her finances.

Carlie Henson's recollection of the conversation differed from Lucy Simmons's. Carlie testified that she asked Lucy if any prior insurer had cancelled, declined, or refused to renew similar insurance on the Monroe

County home and that Lucy answered "no."[8] Kay Eddins testified that she heard Carlie Henson ask the question and heard Lucy Simmons's negative response.[9]

In reliance on the answers provided on the "risk selection questionnaire" Safeco issued a policy of homeowners' insurance to the Simmons. The one-year policy became effective on February 5, 1992. Pursuant to the policy's terms and conditions, Safeco insured the Simmons's dwelling and contents for losses due to fire and other perils.

In April and September 1992, Lucy Simmons applied for automobile insurance with Safeco, again through the Harrigan Insurance Agency. On her applications, her marital status was noted as divorced; indeed, one application stated that Lucy Simmons had been divorced for more than one year.

The Simmons made a claim on their homeowners' insurance policy in July 1992, after a water pipe burst causing damage to the floor of the Simmons's home and some furniture. The $5,000 claim was paid promptly, without incident. In or around September 1992, Safeco

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[8] Carlie Henson testified that she did not know that Lucy Simmons had bad credit at the time the underwriting information was obtained. She never discussed Lucy Simmons's credit with her. Carlie Henson was aware that several years earlier Lucy Simmons had problems collecting a decorating bill from another agent and a related cash flow problem.

[9] At trial, Lucy Simmons conceded that the answer to the nonrenewal question on the risk selection questionnaire was incorrect. She also acknowledged that she had bad credit at the time of Southern Guaranty's nonrenewal.

notified the Simmons that the coverage limits under the policy were going to be increased effective at the time of the policy's 1993 renewal.

The Simmons's home and its contents were completely destroyed by fire on or about November 26, 1992. The Simmons filed a loss claim pursuant to the Safeco policy. Suspecting that the loss was due to arson, Safeco initiated an investigation that ultimately lasted several months. Safeco denied the Simmons's claim by letter dated May 12, 1993, and rescinded the insurance policy. The denial and rescission were based on Safeco's determination that Lucy Simmons had misrepresented a material fact – that no prior insurance carrier had cancelled or declined homeowners' insurance coverage to the Simmons – when applying for the Safeco policy. That circumstance had not been discovered or even investigated in April or September 1992, when Lucy Simmons applied for Safeco automobile insurance, in June 1992, when Safeco paid the Simmons's claim for water damage, or in September 1992, when Safeco decided to increase the coverage limits of the policy.[10]

Prior to denying the Simmons's claim, Safeco's claims adjusters interviewed Lucy Simmons twice and took

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[10] Basically, Safeco's employees conceded that the circumstances surrounding the destruction of the Simmons's home prompted the prolonged investigation that led to the denial of the Simmons's fire loss claim. The water loss claim was relatively small and the circumstances surrounding the loss were such that Safeco simply paid the claim without conducting a thorough investigation. Also, Safeco did not conduct a thorough investigation in September 1992, when it increased the coverage amount under the policy.

statements from Carlie Henson and Kay Eddins. The adjusters also spoke with Randy McDonald, contacted a .Southern Guaranty official to find out why Southern Guaranty had not renewed the Simmons's insurance coverage, and consulted with members of Safeco's underwriting department. At trial, the claims adjuster who wrote the denial letter, Nick Passamato, testified as to the steps that were taken in processing the Simmons's claim.[11] Safeco underwriting manager Greg Copeland testified that Safeco would not have issued the policy to the Simmons in the first place had Safeco known of the Simmons's prior nonrenewal and known that the nonrenewal was due to the Simmons's bankruptcy and bad credit problems. According to Copeland, Safeco relied on the information contained on the "risk selection questionnaire" in issuing the insurance policy. Because the answer to the nonrenewal question was "no," Safeco did not contact Southern Guaranty prior to issuing the insurance policy and did not believe that it had a reason for doing so.[12]

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[11] Plaintiffs' counsel attempted to depict Safeco as having spent months looking for a way out of having to pay the Simmons's fire loss claim. Notwithstanding counsels's [sic] efforts, Passamato's testimony as to steps that Safeco took in denying the claim went uncontradicted.

[12] According to the testimony of Safeco's employees, Safeco relies upon the underwriting information on the risk selection questionnaire in determining whether or not to accept a risk. There was nothing on the plaintiffs' application to trigger a credit report or investigation. The application indicated that the plaintiffs had lived in the residence for an extended period of time and had stable employment.

The Simmons initiated this lawsuit on or about August 25, 1993. They proceeded to trial on claims for breach of contract and bad faith refusal to pay. Safeco raised misrepresentation as a defense to the breach of contract claim;[13] and, the Simmons argued to the jury that Safeco had waived. its right to raise misrepresentation as a defense. The jury returned a general verdict in favor of the plaintiffs on the breach of contract and bad faith claims.[14] Wendell Simmons was awarded a total of

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Safeco's representatives testified that information contained on the risk selection questionnaire concerning prior nonrenewals or cancellations is significant to Safeco. When an application discloses a prior nonrenewal, Safeco stops processing the application until it has an opportunity to determine the reasons for the nonrenewal. Safeco still issues a policy when its investigation determines that the reason for the nonrenewal did not involve an underwriting problem that would or could increase the risk of loss to Safeco. For example, a policy may still be issued if the nonrenewal was because the insurer stopped writing coverage in that state. Safeco would not accept the risk and would not issue a policy, however, if the reason for the nonrenewal was significant bad credit, such as a bankruptcy. The evidence in this case was undisputed that Safeco would not have issued the homeowners policy had it known that Lucy Simmons had a prior bankruptcy and credit problems.

[13] Safeco filed a declaratory judgment counterclaim against the Simmons seeking a determination that the insurance policy was null and void from its inception due to misrepresentations that were made on the application for insurance. Safeco also sought an order requiring the plaintiffs to reimburse Safeco monies that Safeco paid to the mortgagee under the policy. The counterclaim was withdrawn at the conclusion of all the evidence.

[14] Because the jury returned a general verdict, it is not possible to tell if the jury rejected Safeco's misrepresentation

$135,120 (which included $50,000 for mental anguish) and Lucy Simmons was awarded a total of $136,600 (which included $75,000 for mental anguish) in compensatory damages under the breach of contract claim. The Simmons were awarded a total of $2,000,000 in punitive damages under the bad faith claim; compensatory damages were neither sought nor awarded thereunder.

Discussion

A. Standard of Review

The standard of review governing motions for judgment as a matter of law is well-established. When ruling on such motions,

> the court should consider all of the evidence – not just that evidence which supports the nonmover's case – but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality in weight that reasonable and fair-minded men in the exercise of impartial

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defense in its entirety or accepted the defense but further concluded that Safeco had waived its right to raise misrepresentation as a bar to enforcement of the contract. It is not necessary for the court to resolve that issue because, in the court's opinion, the misrepresentation and waiver arguments are relevant only to the breach of contract claim.

> judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury.

Michigan Abrasive Co., Inc. v. Poole, 805 F.2d 1001 (11th Cir. 1986) (citing *Neff v. Kehoe*, 708 F.2d 639, 641-42 (11th Cir. 1983) (quoting *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1979)). *See also Daniel v. City of Tampa Florida*, 38 F.3d 546, 549 (11th Cir. 1994) (court must view the evidence in the light most favorable to the non-moving party); *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318, 1333 (11th Cir. 1994) (quoting 5A MOORE'S FEDERAL PRACTICE ¶ 50.07[2] (1994)) ("It is well-established that '[j]udgment as a matter of law after the verdict may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment.' "); *Sherrin v. Northwestern National Life Ins. Co.*, 2 F.2d 373, 377 (11th Cir. 1993).

In considering Safeco's motion for judgment as a matter of law this court ultimately must determine whether "the facts and inferences point so overwhelmingly in favor of the movant . . . that reasonable people could not arrive at a contrary verdict." *Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1448 (11th Cir. 1991).

> If the jury verdict is supported by substantial evidence – that is, enough evidence that reasonable minds could differ concerning material facts – the motion should be denied. A mere scintilla of evidence in the entire record, however, is insufficient to support a verdict. *See Hesson ex rel. Allstate Ins. Co. v. Jaguar Cars, Inc.*, 915 F.2d 641, 644 (11th Cir. 1990).

U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986, 993 (11th Cir. 1993).

> A judgment as a matter of law "will not lie if the dispute about the material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 206 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) (standard for summary judgment mirrors that of directed verdict).

Tate v. Government Employees Ins. Co., 997 F.2d 1433 (11th Cir. 1993). "The moving party is entitled to [relief] if the nonmoving party failed to make a showing on an essential element of his case with respect to which he had the burden of proof." *Smith v. United States*, 894 F.2d 1549, 1552 (11th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

B. Analysis[15]

Safeco contends that it is entitled to relief on the bad faith claim because the plaintiffs failed to prove an essential element of their claim for relief – that is, that Safeco lacked an arguable or debatable reason to support its denial of the plaintiffs' fire loss claim – by a preponderance of the evidence. In support of that contention,

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[15] Safeco filed a motion for a judgment as a matter of law on the bad faith claim at the close of the plaintiffs' evidence and again at the close of all of the evidence. It also objected to the court's oral charge to the jury on the bad faith claim. Following trial, Safeco timely renewed its motions for judgment as a matter of law. *See* FEDERAL RULE OF CIVIL PROCEDURE 50(b).

Safeco notes that its determination, following an investigation, that Lucy Simmons made a misrepresentation about the nonrenewal of the Southern Guaranty policy when she applied for the Safeco policy provided it with an arguable or debatable reason to deny the Simmons's fire loss claim. The plaintiffs contend that Safeco's denial was based solely on a "swearing match" between Lucy Simmons and Carlie Henson. They cite case law for the proposition that an arguable or debatable reason cannot be premised solely on an insurance company's reliance on its agent's testimony over that of the insured.[16]

> [T]here are two "legs" or prongs to a bad faith action. [The Alabama Supreme Court] stated in *Chavers* [*v. National Security Fire & Casualty*], 405 So. 2d [1] at 7:
>
> > "[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.' "

Blue Cross & Blue Shield of Alabama v. Granger, 461 So. 2d 1320, 1327-28 (Ala. 1984).

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[16] The parties argued extensively in brief about the propriety of the submission of the plaintiffs' bad faith claim to the jury in the absence of a determination by the court that the plaintiffs were entitled to a directed verdict on the breach of contract claim. The court need not resolve that issue given its determination in text that the plaintiffs failed to prove one or more essential elements of the bad faith claim.

In order to prevail, the plaintiff in a bad faith case must prove, by a preponderance of the evidence: (a) the existence of an insurance contract between the parties and a breach of that contract by the insurer; (b) an intentional refusal to pay the insured's claim; (c) the absence of any reasonably legitimate, debatable, or arguable reason for that refusal; and (d) the insurer's actual knowledge of the absence of any legitimate or arguable reason. If the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff also must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim. *National Security Fire & Casualty Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982).[17]

---

[17] The court charged the jury on bad faith as follows:

> In order to recover on their bad faith claim against the defendant, the plaintiff initially must prove, by a preponderance of the evidence, that a valid and binding contract existed between them and Safeco. Safeco must not have proved, by a preponderance of the evidence, that plaintiffs made a misrepresentation that voids the insurance contract, or, if the defendant satisfied that burden, then the plaintiffs must have proved, by a preponderance of the evidence, that Safeco waived the right to void the policy on the basis of a misrepresentation by the plaintiffs.
>
> The plaintiffs also must prove, by a preponderance of the evidence, the following elements:
>
> First: That by the terms of the contract the defendant was obligated to pay the plaintiffs' claim for insurance benefits;

"The 'debatable reason' under (c) above means an arguable reason, one that is open to dispute or question." *Id.* (citations omitted). "No lawful basis 'means that the insurer lacks a legitimate or arguable reason for failing to pay the claim.' . . . When a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law." *Id.* (citation omitted). *Accord Gulf Atlantic Life Ins. Co. v. Banes*, 405 So. 2d 916 (Ala. 1981). "In short, [the] plaintiff must go beyond a

---

> Second: That the defendant intentionally refused to pay the plaintiffs' claim;
>
> Third: that there was no reasonably legitimate, arguable, or debatable reason for that refusal to pay, that is, no reason that was open to dispute or question; and
>
> Fourth: That the defendant had actual knowledge that there was no reasonably legitimate, arguable, or debatable reason.
>
> As you have been instructed, the burden is upon the plaintiffs to satisfy you by a preponderance of the evidence that Safeco had actual knowledge at the time the claims denial was made that there was no reasonably legitimate, arguable, or debatable reason for its refusal to pay. The knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company where there is a reckless indifference to facts or to proof submitted by the insured. Whether an insurance company was justified in denying a claim on a policy must be judged solely by the evidence that was before the insurance company at the time the decision to deny was made. Neither negligence nor bad judgment by an insurer in denying a claim supports a claim of bad faith.

Trial Transcript at pages 1039-41.

mere showing of nonpayment and prove *bad faith* nonpayment, a nonpayment without any reasonable ground for dispute. Stated differently, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim." *Bowen*, 417 So. 2d at 183. Importantly, [w]hether an insurance company [was] justified in denying a claim under a policy must be judged by what was before it at the time the decision [was] made." *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982).

In this case, viewing the evidence and all reasonable inferences in the light most favorable to the plaintiffs, the court finds that there was a genuine dispute concerning the information that was given by Lucy Simmons to Safeco's agent, Carlie Henson, relating to whether the Simmons had been nonrenewed by a prior insurer. Considering all of the evidence that was presented on this issue, the court concludes that no reasonable jurors could conclude that Safeco lacked a reasonably legitimate, debatable, or arguable reason for the refusal to pay the Simmons's insurance loss claim, and that Safeco had actual knowledge of the absence of any legitimate or arguable reason.

Safeco's decision in this case was not, as the plaintiffs suggest, based solely on a dispute between Lucy Simmons's testimony and that of Safeco's agent, Carlie Henson. Had it been so, then the result in this case might well have been different. *See, e.g., Jones v. Alabama Farm Bureau Mutual Cas. Co.*, 507 So. 2d 396 (Ala. 1986) (holding, on the basis of the unique facts before it, that summary judgment on a bad faith claim should not have been granted where the reason for the claims denial consisted

solely of the substance of a disputed conversation between the insured and the insurer's claims adjuster; to hold otherwise "would frustrate the purpose of the bad faith action by allowing an insurer simply to misrepresent the content of an oral conversation to avoid liability"). *But see National Security Fire & Can. Co. v. Vintson,* 454 So. 2d 942 (Ala. 1984).

It is true that the genesis of the insurer's question concerning coverage consisted in the substance of the disputed conversation between Lucy Simmons and Carlie Henson. Safeco did not deny the Simmons's claim immediately after learning of that dispute or simply by choosing to believe Carlie Henson's version of the application conversation over Lucy Simmons's. Rather, Safeco took all the steps that it could to resolve the dispute and made a decision based on its total findings.

As noted, in addition to taking statements from Lucy Simmons and Carlie Henson, Safeco's claims adjusters spoke with Kay Eddins, the only witness to the conversation between Lucy and Carlie. Kay Eddins's version of events corroborated Carlie Henson's. Safeco also spoke with Randy McDonald. McDonald, who did not work for Safeco and had no relationship with or to it, was not present for the conversation between Lucy Simmons and Carlie Henson; therefore, he obviously could neither support nor contest Carlie's version of events or Lucy's.

McDonald testified that he telephoned Lucy Simmons a few days after November 29, 1991, and advised her that Southern Guaranty would not renew the Simmons's homeowners' policy. He stated that he last talked to her about the nonrenewal on or about January 8, 1992

(around the time the Southern Guaranty policy was to expire) and advised her that he could not place the business with another insurance company and that she needed to get insurance with someone else. He testified she said she would. He informed Safeco of the steps he personally took to notify Lucy Simmons of the fact of the Southern Guaranty nonrenewal. Lucy Simmons basically denied McDonald's version of events. From McDonald's statement Safeco could conclude that Lucy Simmons had knowledge of the nonrenewal and did not provide that information to Carlie Henson. McDonald's statement impugned Lucy Simmons's credibility and could provide a basis for the conclusion that Lucy Simmons had a motive to provide misinformation when for the homeowners' insurance policy. Considering McDonald's statement, Safeco had information, in addition to that which was provided by their agents, that Lucy Simmons's report to Safeco on her knowledge of the status of her prior policy and on what she said to Safeco's agents was not correct.

Safeco's inquiry did not end there. Instead, Safeco then contacted Southern Guaranty and verified that the Simmons's prior homeowners' policy had, in fact, been nonrenewed. Safeco also ascertained the reason for the nonrenewal – the Simmons's bankruptcy and bad credit – and concluded that it would not have issued the Simmons's a homeowners' insurance policy had it known of that information at the time the application for the Safeco policy was received. All of the information gathered by Safeco during its investigation provided it with a reasonably legitimate, debatable, or arguable reason to deny the Simmons's claim.

Even assuming the jury accepted Lucy Simmons's version of her conversation with Safeco's agents as being what, in fact, occurred, the record is devoid of evidence that Safeco had actual knowledge of the absence of a reasonably legitimate or arguable reason at the time the claim was denied. The court finds from all of the evidence that was presented at trial that Safeco made a reasonable investigation prior to denying the Simmons's claim and, based on that investigation, had a reasonably legitimate, debatable, or arguable reason at the time of the denial. Safeco concluded that Lucy Simmons had been asked the nonrenewal question by Carlie Henson and denied that a nonrenewal had occurred. It had additional reason to question Lucy Simmons's veracity. Evidence of those circumstances refutes the plaintiffs' contention that Safeco actually knew that it did not have a basis for denying the Simmons's claim.[18] Accordingly, Safeco is entitled to a judgment as a matter of law on the bad faith claim for plaintiff's failure to prove the absence of a reasonably legitimate or debatable reason to deny the Simmons's claim and/or Safeco's actual knowledge of the absence of such a reason.

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[18] With respect to Safeco's prior opportunities to investigate the circumstances surrounding the taking of the homeowners' application, the court notes that the plaintiffs cannot establish bad faith by estoppel. Also, although Safeco's insurance application leaves much to be desired (by, for example, not containing a specific question about bankruptcies or bad credit or including a signature line for the prospective insured), it is not legally infirm. The practical inadequacies of the application do not impact the court's decision on the bad faith claim.

Conclusion

For the foregoing reasons, the court concludes that Safeco is entitled to a judgment as a matter of law on the plaintiffs' bad faith claim.[19] Safeco's requests for remittitur and for relief on the bad faith claim for plaintiffs' failure to prove their entitlement to punitive damages by clear and convincing evidence are **MOOT**; and, Safeco's request for relief on all remaining grounds set forth in its post-trial motions and briefs is **DENIED.**

The jury's verdict on the bad faith claim is **SET ASIDE** and a **FINAL JUDGMENT** for the defendant is hereby entered thereon. The jury's verdict on the breach of contract claim shall remain in full force and effect. Plaintiffs shall have ten (10) days from the date of this order in which to file a costs bill with the Clerk of Court.

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[19] Under FEDERAL RULE OF CIVIL PROCEDURE 50(c), if a "renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial." In its "renewed motion for judgment as a matter of law or, in the alternative, motion for new trial or, in the alternative, motion for remittitur" the defendant requested, *inter alia*, a new trial on the bad faith claim; however, the defendant did not press that contention during oral argument or in any of its post-trial briefs. Consequently, the court considers the defendant to have abandoned that issue. To the extent that the defendant seeks a new trial on the grounds discussed *supra* in footnote 1, the court concludes that the request is due to be denied.

DONE this the 11 day of May, 1995.

/s/ Richard W. Vollmer, Jr.
UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU.DIST.ALA.
FILED THIS THE
12th DAY OF May,
1995, JUDGEMENT ENTRY
NO. 4247
DEBORAH S. HUNT, CLERK
BY B Turner
DEPUTY CLERK

JUDGMENT
ENTERED
ON DOCKET
FILED 5-17-95
Deborah S. Hunt,
CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WENDELL M. SIMMONS and MONA "LUCY" SIMMONS,	*	
Plaintiff,	*	CIVIL ACTION
	*	NO. 93-0704-RV-S
VS.	*	
SAFECO INSURANCE COMPANY OF AMERICA,	*	(Filed Nov. 9, 1994)
Defendants.	*	

ORDER

The above-styled case came on for trial by jury on November 2, 3, 4 and 7, 1994 with the Honorable Richard W. Vollmer, Jr., United States District Judge presiding. The jury was selected, but not sworn on November 1, 1994 before the Honorable William H. Steele, United States Magistrate Judge.

On November 2, 1994, the jury was duly sworn and trial began. The plaintiffs presented their case-in-chief on November 2, 3 and 4, 1994 and rested. The defendant filed a motion in open court for judgment as a matter of law which was DENIED. The defendant presented its evidence and rested. The court recessed the jury and a hearing was held with counsel present. The Plaintiff orally moved to dismiss the counterclaim filed by the defendant. The defendant, Safeco Insurance Company of America, voluntarily moved to dismiss the counterclaim against the plaintiffs, Wendell Simmons and Mona

"Lucy" Simmons which was GRANTED. The defendant orally renewed his motion for judgment as a matter of law at the conclusion of the plaintiff's case which was DENIED.

On November 7, 1994, the court held a charge conference with counsel. Court reconvened and the respective parties gave their closing arguments to the jury. The court charged the jury on the applicable law and the jury commenced their deliberations.

On November 7, 1994, comes the jury who having heard the evidence, the arguments of counsel, the charge of the court and having considered the same upon their oaths, return the following special verdict, a copy of which is attached hereto, into open court.

The court will enter judgment in accordance with the special verdict of the jury by separate order.

Done this the 9th day of November, 1994.

/s/ Richard W. Vollmer Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-6473

WENDELL M. SIMMONS, and
MONA SIMMONS, a/k/a
MONA "LUCY" SIMMONS,

Plaintiffs-Counter-
Defendants-Appellants,

versus

SAFECO INSURANCE COMPANY OF AMERICA,

Defendant-Counter-
Claimant-Appellee,

GREAT SOUTHERN WOOD PRESERVING, INC.,

Movant.

On Appeal from the United States District Court for the Southern District of Alabama

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(Filed Oct. 1, 1996)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion , 11th Cir., 19__, ___ F.2d ___).

Before: HATCHETT, Chief Judge, TJOFLAT and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ R. L. Illegible
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WENDELL M. SIMMONS and MONA "LUCY" SIMMONS,	:	
Plaintiffs,	:	**CIVIL ACTION**
v.	:	**NO. 93-0704-RV-S**
SAFECO INSURANCE COMPANY OF AMERICA,	:	
Defendant.	:	

VERDICT

Part A: COUNT ONE: BREACH OF CONTRACT

(Circle 1 or 2)

1. We the jury find for the plaintiffs on their claim for breach of contract and assess damages against the defendant as follows:

   a. Plaintiff Wendell Simmons:

   Dwelling loss (up to the policy limits) plus interest: $51,520

   Personal property loss (up to the policy limits) plus interest: $33,600

   Mental anguish: $50,000

   b. Plaintiff Mona "Lucy" Simmons:

   Personal property loss (up to the policy limits) plus interest $61,600

   Mental anguish: $75,000

2. We the jury find for the defendant on the plaintiffs' breach of contract claim.

NOTE: If you find for the defendant on plaintiffs' breach of contract claim, proceed to the end and have your jury foreperson sign. If you find for the plaintiffs on the breach of contract claim, complete Part B of this verdict form.

Part B: COUNT TWO: BAD FAITH

(Circle 1 or 2)

1. We the jury find for the plaintiffs on their bad faith claim and assess the following punitive damages against the defendant, plaintiffs have established their entitlement to such damages by clear and convincing evidence:

   $2,000,000.

2. We the jury find for the defendant on the plaintiffs' bad faith claim.

SO SAY WE ALL.

DONE this the 7 day of November, 1994.

/s/ Dean Nobles
FOREPERSON

FILED IN OPEN COURT.
THIS THE 7th DAY OF Nov.,
1994.
DEBORAH S. HUNT, CLERK
BY: /s/ Marie Illegible
DEPUTY CLERK

15C

SAFECO®

COMPLETE AND STAPLE TO COMPANY COPY OF DECLARATIONS

RISK SELECTION QUESTIONNAIRE

INSURED Wendell Simm
POLICY NO. F1198962

(VERIFIED

1. Age of insured [redacted] 40
2. Marital status: ☒ married ☐ single ☐ widowed
   ☐ divorced or separated — How long? _____
3. | | Occupation | Employer | No. Yrs. |
   |---|---|---|---|
   | Insured | Timber Broker-Treatall | | 22 |
   | Spouse | Interior Dec. | Interstate | 6 |
4. How long has the insured lived at this address? 12 yrs
   If less than 2 years how long at previous address? _____
5. Insured's previous carrier at this or previous address: So. Guaranty Policy No. 522662
6. How many losses have occurred during the last 3 years to the insured's home or personal possessions at this or another location (such as fire, theft, glass, wind, cigarette burns, liability, water damage, freezing, etc.)? NONE

	Date	Cause and Circumstances	Amount
a.			
b.			
c.			

7. Has any company canceled, declined, or refused to renew similar insurance to the insured within the past 5 years? NO If Yes, explain in Remarks.
8. How long have you known the insured? 7 yrs

DWELLING

9. Date you last inspected property 1/29
10. Maintenance of dwelling and premises (consider interior, roof, yard, etc.)
    ☒ Good or Excellent ☐ Average
    ☐ Other (describe) _____
11. Year dwelling built 78

COMPLETE QUESTIONS 12 & 13 IF DWELLING BUILT PRIOR TO 1950

12. Is there a thermostatically controlled central heating system? _____
    If not, describe _____
13. Has wiring been updated? _____ If Yes, indicate extent:
    ☐ Service Panel ☐ Rewired ☐ Other _____

COMPLETE QUESTIONS 14 & 15 ON ALL RENTERS FORMS

14. Indicate number of bedrooms in unit _____
    Family Room? ☐ Yes ☐ No
15. Security and Protective devices (check applicable items)
    ☐ Locked building entry
    ☐ Dead bolt locks (outside doors)
    ☐ Window locks
    ☐ Manager living on premises
    ☐ Other (describe) _____
    ☐ Security attendant
    ☐ Fire Extinguisher(s)
    ☐ Smoke Detector(s)

KS: Mark this is a very good risk for Safeco. The reason I'm giving us this extra time is I'll see if I will be placing them w/ Safeco also

Agent's Signature Cathy Hansen Date 2/5/92

042103/86

AGENT'S COPY

®Registered trademark of SAFECO Corporation

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BEST AVAILABLE COPY

PLAINTIFF'S EXHIBIT 3

C 00021

Policy No. (SAFECO/FN) 0 New (if known)

15G

INSURED'S STATEMENT

Any "yes" answer for questions 1 through 4 must be explained in detail under "Remarks"

1. Has any company canceled, declined or refused renewal for any driver during past 5 years? (Not applicable in D.C.) ..... No
2. Does any driver have a physical impairment, including heart condition, diabetes, epilepsy, etc.? ..... No
3. Has any driver had his/her driver's license revoked or suspended during past 5 years? ..... No
4. Does any car have damaged glass? ..... No
5. How many cars (including any provided by an employer) in the household? ____ If other cars are insured in SAFECO Group, give policy Nos. ____
6. Are there any children in the household? ____
   If yes, give ages: Male ____ Female ____

	Occupation of Insured	Occupation of Insured's Spouse
Insured	Child	—
Spouse	—	

Employer's name (If self employed, name/nature of business) — Type of Business — How many years with this employer?

Insured: Instructor Trainee — 6 yrs

7. Is car owned by a corporation? .....
   If yes, state name and address of corporation under "Remarks" or on an accompanying memo.
8. Does any driver use this car in his/her business or occupation? .....
9. Is car used for going to or from work or school? .....
   If yes, work/school address ____
10. Is car garaged on farm or ranch and not used in going to or from work other than farming? .....
11. What is estimated annual mileage? .....
12. Insured's previous insurance Co. Southern Guaranty Policy No. GLAD357

[redacted]

☐ Car # ____
☐ Yr./Name ____
☐ Yes, insured's title

☐ No
☐ Yes ☐ No

☐ Yes, Mi. one way
☐ No Days per wk.

14. Names of all drivers—including roommates—in household (Omit last name if same as applicant.)	Sex M	Sex F	Birth Date Mo. Day Yr.	Married, Single, Separated, Divorced or Widowed*	Will drive what % of total annual mileage?	Driver's License Number	"Y" gave driver (a answ
Insured or applicant Lucy		X	7/29/53	Divorced	%	5154878 OR	
Angelia		X	8/18/74	Single	%	5870656 OR	
					%		
					%		
					%		

*If widowed (or divorced or legally separated): (a) How long? ____ (b) Does driver have custody of children? ____

15. During the past 3 years, have you or any other person named in Item 14, been: (a) involved (as a driver, whether or not at fault) in an accident resulting in damage to property, yours or others, or in bodily injury or death? ..... ☐ Yes ☒ No
    If convicted of or paid a fine for a violation of any traffic law (other than parking)? ..... ☒ Yes ☐ No
    If either answer is "

Name of driver	Place of accident or violation	Date of accident or violation	Type of violation	What was result of accident? Bodily injury or death	Total amount of property damage	Explanation of accident or violation. (continue under "Remarks" if more space nee
Lucy	Florida		Spd.	☐ Yes ☐ No	$	Loma Rio
				☐ Yes ☐ No	$	
				☐ Yes ☐ No	$	

16. Have all drivers under 21 received certificates for driver training? Yes (attach certificates.)
17. Number of years driving experience in the U.S. and/or Canada: Insured 23 Spouse (if applicable) 1
18. How long have you resided at present address? 10 yrs Previous address if less than 2 years ____
19. Is car kept in garage at night? [redacted] ____
20. Type of Residence: ☒ Owned Private Dwelling ☐ Rented Private Dwelling ☐ Apartment ☐ Owned Mobile Home ☐ Other ____

Remarks: ____

I declare the facts stated hereon to be true and request the company to issue the insurance and any renewals thereof in reliance thereon. I understand that insurance will not be effective if any check for the premium is not honored when it is presented for payment.
NOTE: A traffic violation report may be obtained on any driver.
Further, I acknowledge that I have been offered Uninsured Motorists coverages with limits up to the Bodily Injury Liability limits. I have elected to purchase limits shown on the Declarations page. If no limits are entered on the Declarations page, I have rejected this coverage. (Rejection not permitted in some stat

Date 4/24/92 Signature of Insured [redacted]

TO BE COMPLETED BY AGENT (FIRST NATIONAL ONLY):

1. How long have you known the insured? ____
2. Have you checked the insured's drug use and drinking habits? Yes
3. If placed in First National because of driving record, please comment on the Prognosis For Improvement. N/A
4. If placed in First National for reasons other than driving record, why? because of recent dui's. I think I said to put in 1st Natl
5. If no insurance previously, why not? N/A
   If the insured's previous insurance company is Sub-Standard, why insured here? N/A
   Does the insured have other insurance with us? Yes Policy Nos. OR 1938962
   If not, what other insurance do you expect to write with us and when? ____

Agent's Signature [redacted]

PLAINTIFF'S EXHIBIT 19

AGENT'S COPY

CA-1 R21 6/88

App. 40

Name of Insured [illegible]

Policy No. (SAFECO/FN) F1317181 (if known)

mail to CO's copy

15H

INSURED'S STATEMENT

Any "yes" answer for questions 1 through 4 must be explained in detail under "Remarks"

1. any company canceled, declined or refused renewal for any driver during past 5 years? (Not applicable in D.C.) ..... Yes Safeco - F1290624
2. Does any driver have a physical impairment, including heart condition, diabetes, epilepsy, etc.? ..... No
3. Has any driver had his/her driver's license revoked or suspended during past 5 years? ..... No
4. Does any car have damaged glass? ..... No
5. How many cars (including any provided by an employer) in the household? 2 If other cars are insured in SAFECO Group, give policy Nos. _____
6. Are there any children in the household? No
   If yes, give ages: Male _____ Female _____
7. Occupation of Insured: Driver — Occupation of Insured's Spouse: _____
   Insured — Employer's name (if self-employed, name/nature of business): Interstate to Interstate — Type of Business — How many years with this employer? 2 yrs.
   Spouse
8. Is car owned by a corporation? ..... If yes, state name and address of corporation under "Remarks" or on an accompanying memo. [redacted] Car # _____ Yr., Name _____ Yes, insured's title is: _____
9. Does any driver use this car in his/her business or occupation? ..... [redacted] No
10. Is car used for going to or from work or school? ..... [redacted] Yes ☒ No — If yes, work/school address _____ — ☐ Yes, Mi. one way ___ Days per wk. ___ ☒ No
11. Is car garaged on farm or ranch and not used in going to or from work other than farming? ..... [redacted] No
12. What is estimated annual mileage? ..... [redacted] 8000
13. Insured's previous Insurance Co. Southern Pacific Policy No. [redacted] 1-LAD35[illegible]

Names of all drivers—including roommates—in household (Omit last name if same as applicant.)	Sex M	Sex F	Birth Date Mo.	Day	Yr.	Married, Single, Separated, Divorced or Widowed*	Will drive what % of total annual mileage?	Driver's License Number	"Y" govern driver (age answer)
Insured or applicant →		X	7	29	53	Divorced	[redacted] 100%	5154878 CA.	[redacted] Y
							%		
							%		
							%		
							%		

*If widowed (or divorced or legally separated): (a) How long? 1 yr., (b) Does driver have custody of children? Yes but children are grown

During the past 3 years, have you or any other person named in item 14, been: (a) involved (as a driver, whether or not at fault) in an accident resulting in damage to property, yours or others, or in bodily injury or death? ..... ☐ Yes ☒ No
(b) convicted of or paid a fine for a violation of any traffic law (other than parking)? ..... ☐ Yes ☐ No
If either answer is "Yes" complete the following

Name of driver	Place of accident or violation	Date of accident or violation	Type of violation	What was result of accident? Bodily injury or death	What was result of accident? Total amount of property damage	Explanation of accident or violation. (continue under "Remarks" if more space needed)
Mona	Ala.	2/5/90	3pd	☐ Yes ☐ No	$	Speeding
"	Ariz.	12/15/91	3pd	☐ Yes ☐ No	$	"
				☐ Yes ☐ No	$	

16. Have all drivers under 21 received certificates for driver training? _____ (attach certificates.)
17. Number of years driving experience in the U.S. and/or Canada: Insured 23 Spouse (if applicable) _____
18. How long have you resided at present address? _____ Previous address if less than 2 years _____
19. Is car kept in garage at night? [redacted] No
20. Type of Residence: ☒ Owned Private Dwelling ☐ Rented Private Dwelling ☐ Apartment ☐ Owned Mobile Home ☐ Other _____

Remarks: _____

I declare the facts stated hereon to be true and request the company to issue the insurance and any renewals thereof in reliance thereon. I understand that insurance will not be effective if any check for the premium is not honored when it is presented for payment.
NOTE: A traffic violation report may be obtained on any driver.

Further, I acknowledge that I have been offered Uninsured Motorists coverages with limits up to the Bodily Injury Liability limits. I have elected to purchase limits shown on the Declarations page. If no limits are entered on the Declarations page, I have rejected this coverage. (Rejection not permitted in some states)

Date 9/25/92 Signature of Insured Mona L Duncan

TO BE COMPLETED BY AGENT (FIRST NATIONAL ONLY):

1. How long have you known the insured? 1 yr. 2. Have you checked the insured's drug use and drinking habits? Yes
3. If placed in First National because of driving record, please comment on the Prognosis For Improvement. _____
4. If placed in First National for reasons other than driving record, why? Because before daughter tracker was NOT for you but now daughter tracker is not in the house!
5. If no insurance previously, why not? _____
   If the insured's previous insurance company is Sub-Standard, why insured there? _____
6. Does the insured have other insurance with us? Yes - Life Policy Nos. OF1198962
   If not, what other insurance do you expect to write with us and when? _____

Agent's Signature Kasi Eddins

SA 1821 6/88

PLAINTIFF'S EXHIBIT 25

AGENT'S COPY

CM: 047

App. 41

May 7, 1993 *CERTIFIED MAIL*

Mr. Wendell M. Simmons
Route 2, Box 98-B
Monroeville, AL 36460

Dear Mr. Simmons:

Policyholder: Wendell & Lucy Simmons
Policy Number: OF 1198962
Date of Loss: 11/26/92

We have completed our investigation of your fire loss on November 26, 1992. Our investigation reveals that several entries in your application for insurance with SAFECO Insurance Company were misrepresented to the agent, Carly Henson. Specifically those areas relating to marital status and cancellation/nonrenewal proved to be inconsistent with our findings.

Please refer to your homeowners policy, "Sections I and II – Conditions", which states in part the following:

"SECTION I AND SECTION II – CONDITIONS

2. Concealment or fraud. We do not provide coverage for any insured who has:

a. intentionally concealed or misrepresented any material facts or circumstances; or

b. made false statements or engaged in fraudulent conduct relating to this insurance."

DEFINITION

5. "insured" means you and the following residents of your household:

a. your relatives;

b. any other person under the age of 21 who is in the care of any person named above."

This information has subsequently been reviewed by our underwriting department. Based on the fact you were being

nonrenewed by your prior insurance carrier, Southern Guaranty, it has been determined that had our underwriting department or the agent been aware of the non-renewal, we would not have accepted your application of insurance as it was not consistent with our established underwriting standards.

Since our investigation has revealed that false statements have been made and that you have intentionally concealed or misrepresented material facts or circumstances about your prior insurance, we are denying your claim for insurance on the fire loss dated November 26, 1992.

Our investigation shows that the risk was materially misrepresented and we would not have written this risk had we known the true facts. We consider this policy to be void from its inception. Further, our underwriting department has taken action to rescind the policy and to refund the premiums you have paid since the policy inception.

In addition to the above outlined specific condition and definition, we rely upon all other policy definitions, conditions and exclusions that could be applicable.

Nothing said in this letter should be deemed as a waiver of our right to insist on strict compliance with the terms and conditions of the policy.

If you disagree or have any other information to cause us to reconsider our position, please submit this information, in writing, and allow us the opportunity to promptly reply.

Sincerely,

Nicholas A. Passomato, Jr.
Nashville Claims
bs/W:23-25

cc: Harrigan Insurance Agency, 40-0945

[p. 12] you're talking about what Safeco's claims department did, I believe that what they did was reasonable in the sense that if they accept what the agent says, that they could deny the claim. They would have a debatable reason.

But the question that I see is the bad faith is not related to Safeco's Claims Department. The bad faith is related to the agents and what they have said and what they have done.

What does the Plaintiff say to that? Let me see what the Plaintiff says.

MR. JACKSON: Well, as Your Honor pointed out, what the agents said and did, at the very least, created a jury question. And that comes out of the case law that's cited by the Defendant. And we know what –

THE COURT: All right. But the claims department has a right, the Safeco claims department has a right to make an investigation. Now, I don't say that the claims department has done something improper. If you have, if you have an insurance adjustor who tells a lie, it's in one of these cases where he says I did this, I can't recall exactly.

MR. JACKSON: It was wind damage as opposed to lightning.

THE COURT: That's right, as opposed to a tree falling, that's that the claims department. But what we have here is the agency department saying something. And the bad faith is in the agency department, not in the claims department. [p. 13] That's as I view it. Now, tell me what the Plaintiff says to that.

MR. JACKSON: Well, I haven't looked at it from the standpoint of did the claims department do right and underwriting not and the agency department being a third department. I see this, Judge, as all three of those entities working together under the procedure that was set up by Safeco, namely, this risk selection questionnaire that nobody can believe in, not even the claims department. The man said, I wouldn't do insurance with a company that wouldn't let me see and sign my application.

THE COURT: All right. Let's let Mr. Hart go on. I'm sorry.

MR. BRADFORD: Judge, if you are asking about, you know, if there's a dispute, some wrongdoing by the agent, can the insurance company escape liability for bad faith, there's cases that Mr. Hart has listed on pages six and seven on his reply brief. He's got eight cases where there was a directed verdict or summary judgment or reversal so that the insurance company won when the insurance company didn't do anything wrong but there was some wrongdoing by the agent on the application.

The best case to me is your case. This Northwestern, the smoking case where the agent – you know the facts better than I do – but it seems like the insured was taking out a no smoking policy. He was smoking when he did it. The agent was [p. 14] smoking. The agent never asked the question. So, all the wrongdoing in that case was by the agent.

THE COURT: No, the wrongdoing wasn't only by the agent but by the insured who was making the

claim who knew that he was smoking. I mean, there's no – if there's a sentence in this case that said, yes, I admit to making that statement but the agent told me it didn't make any difference, then you're exactly in point on the case that I had.

MR. BRADFORD: I thought the Northwestern case, the agent, I mean, the insured – I may be wrong, but I thought the insured testified that he didn't know it was a non-smoking policy.

THE COURT: I think that may well be.

MR. BRADFORD: So, they didn't know that they were saying something wrong, I believe.

THE COURT: Well, they didn't know they were saying something wrong, but they knew that they smoked. And that was the crux of it. I'm not – I don't have the case in front of me and I haven't looked at that. But the issue, as I say, seems to me to be, and I guess Mr. Jackson called something to my attention that has grabbed me, it's the company's activity. I simply have taken the position that the jury makes the decision as to whether or not the question was asked. And the jury decided the question was not asked.

Now, I'm not to say I would have made the same decision. [p. 15] But I am saying that that is the crux of it as being an extraordinary case. This is not a case where, that the decision was a decision for me to make as to whether or not they made out a prima facie case. I couldn't make that decision. The jury had to decide who was telling the truth and who was telling a lie.

MR. BRADFORD: Judge, you remember, we had this one issue that came up. The jury could have found that the question was asked and that she answered incorrectly and still returned a verdict for the Plaintiff because of the waiver issue. You remember we met on that Saturday about the charge, and you said, Plaintiffs, you be careful because the waiver issue may bite you, or something I like that, that they can find – the jury by its verdict could have found that the question was asked, that it was answered incorrectly, but that we still did not win the claim because the jury found that Safeco had waived that lie on –

THE COURT: Was that on the punitive? I mean, was that on the –

MR. BRADFORD: Contract claim.

THE COURT: Well, on the contract, It's different.

MR. BRADFORD: Yeah.

MR. HART: Judge, yeah, and I think there's some Alabama law that supports Larry. Alabama law is, first, that bad faith involves the claim department. And bad faith is [p. 16] determined by what the claim department had before it at the time it denied the claim.

THE COURT: Well, see Mr. Hart, you continue to say the claims department had before it.

MR. HART: Yes, sir.

THE COURT: That's where you and I are, we're not going in the same direction.

MR. HART: I know, and I'm trying to get in the direction you're going so that this will be useful because Your Honor is the one that has to make the decision and I don't. And let me make this thought and it will either be valid or it won't.

But the company for bad faith is judged by what the company had before it when it denied the claim. Alabama case law also says that if at that time the company had a reasonable basis to deny the claim, there's no bad faith even if at trial the company loses on that argument and the Plaintiff wins on the breach of contract.

So, it would seem to me that even though the contract claim was properly submitted to the jury and the jury resolved that adversely to Safeco, they believed the Plaintiffs' evidence, that still doesn't affect the earlier decision on bad faith where the company had a lawful basis and denied the claim.

We've got two different types of claims in this case, and they are judged differently and they're judged at different [p. 17] times. And back when the claims department either says approved or denied, they had investigated it. They had interviewed people. They had evidence before of reasons. They lost at trial, sure, but they had reasons where they denied it such that it was not intentional, it wasn't done to harm, and it was not done without any reason arbitrarily. It was done with a reason.

THE COURT: What is the jury charge that you're referring to? Where was that – where was the jury charge? Did that refer to the entire case or did that refer

only to the contract claim on the waiver? I don't remember. If it refers to the entire case, then perhaps there may be error. If it refers to the contract claim, I agree with you, Mr. Hart. Whether or not – no, I think it's different. If the jury found there was no breach of contract, then they could not find that there was bad faith –

MR. HART: Yes, sir.

THE COURT: – without question. However, the mere fact that they found for the insured under the contract did not necessarily mean they would find for them under the bad faith. So, the charge as it relates to the contract as to whether or not they could have waived their right as to the contract does not in my mind – and I'd have to look at the jury charge, but if you have it, show me how that jury charge brings to the jury a misconception as to what they have to find to find bad faith.

[p. 18] MR. BRADFORD: Judge, earlier I think I was just answering your question. You said that the jury necessarily had to find that the question wasn't asked. I think you said that. I may have misheard you.

THE COURT: I think that's right.

MR. BRADFORD: But you know, the jury may have found that the question was, in fact, asked and answered incorrectly and then Safeco has waived the right to rescind the policy. So, I was answering the question.

THE COURT: The question I have of the Defendant is how was that addressed in the jury charge? If in the jury charge I said that before the Plaintiff could be entitled to recover, or the Plaintiff would be entitled to

recover if there was waiver, and they could recover for bad faith if there was waiver, I think that probably is – I think that may well be error.

MR. BRADFORD: I think the Court charged the jury in connection with the breach of contract claim.

THE COURT: Well, see, that's the distinction, as I see it, Mr. Bradford. I'm not – Mr. Hart has been here the first time. He may feel that I've got an adverse attitude towards the Defendant in the case. But this was a case that was tried to the jury on the facts that were presented. And that's what we had. I'm not – the amount of the award, if I were granting, if I were finding a verdict in the case, I [p. 19] probably wouldn't render two million dollars. But that's not for me to make the determination. That's for the jury.

And I guess our Supreme Court is going to speak to that again. I see there's another Alabama Supreme Court case that the Court of Appeals – I mean, the Supreme Court has taken, the Supreme Court of the United States has taken up. And I don't understand it because the Supreme Court of the United States has spoken to what we have. And under the Hammond versus – what's the oil?

MR. HART: Green Oil.

THE COURT: The Green Oil case, I thought the U.S. Supreme Court has spoken, that if you have what we have, it's up to the Court to make those decisions. And you know, we have a great deal of publicity, Mr. Hart, on these. But that's why I look at the affidavit here. And there's no dispute by the Defendant. I'm not saying it's

right. You're saying you don't dispute it. But if a corporation makes two million dollars or whatever their judgment is, two-and-a-half million dollars in three quarters of one day, I don't know if that punishment is that severe.

Go ahead, Mr. Hart. I don't mean to bore you with my thoughts.

MR. HART: No, I appreciate that, Your Honor. I don't want to beat a dead horse. Is there anything else I can answer for Your Honor with respect to the motion for judgment [p. 20] notwithstanding the verdict?

THE COURT: Only to show that – and I think Mr. Bradford has called to my attention that you've got these cases cited on pages five and six. And I'll look at them again. But as I say, the problem that I see is the problem that the jury made the determination that Mrs. Simmons told – well, not only did they make the decision she told the truth, but under their findings, Mrs. Simmons did tell the truth. And these ladies misrepresented to the company or misrepresented to their superiors that they asked this question when, in fact, they had not asked the question.

I'm not saying that's what happened, but that's what the jury found. And that's where we get into whether or not this is an extraordinary case. With the attitude, I think, of the Appellate Courts, I think you have an excellent chance in the case in having them take a different view of it.

I practiced law for 30 years, Mr. Hart. and I defended cases for that entire time and only had about two or three plaintiff's cases. And I'm not – I'm not what I consider

plaintiff oriented, but I'm a trial lawyer and a jury trial lawyer. And when the jury speaks, that's what I follow.

If you can show me the merest restatement that the claims department had a right to do what they did, if that is the law, then I'm wrong. And it's as simply as that. So, I don't know if you're going to be able to convince me on that issue.

[p. 21] Now, we have some other issues. And I'll hear you on those when we finish with this.

MR. HART: Well, let me just close on this. I would refer Your Honor to look at the cases we cited in the early section of our brief.

THE COURT: Is this the last brief that you filed?

MR. HART: Yes, sir.

THE COURT: That's page five and six, Mr. Bradford.

MR. BRADFORD: Five and six or six and seven – six and seven.

MR. HART: Six and seven where we've cited about seven or eight cases where there was a dispute between what was said to the agent and – a swearing match between the insured and the agent such that the contract went to the jury on that swearing match, and sometimes the company lost that swearing match. But the Appellate Court held that as a matter of law, bad faith should not have been submitted to the jury.

And based on that principle that there's no prima facie case because in the realm of bad faith, which is a

different thing than we're used to thinking about, the very fact issue that causes the contract claim to be properly submitted to the jury is what negates the Plaintiff's prima facie case for the tort of bad faith. So, you know, anyway, I would refer Your Honor to those cases.

THE COURT: All right. I'll look at them. I am hung [p. 22] up on the issue as to this agent being the company. This is the company. And the company, the corporation can only act through its agents. I mean, that's the only way they can act.

MR. HART: Yes, sir.

THE COURT: If the application was taken by the president of the company, could the claims department then deny it because if they believed the – what could they do? They'd have to believe the president of the company. He'd fire them if they didn't. And you may be right. I'm just saying to you that that's the problem that I have.

MR. HART: And I appreciate what Your Honor is struggling with. And when Your Honor reviews those cases, I think they will answer that question.

THE COURT: All right. That's fine. I'll look at them certainly. All right. Go on to your next argument.

MR. HART: Judge, the next point I wanted to speak to is the excessiveness issue, the motion for remittitur. And the Alabama Supreme Court in adopting the tort of bad faith clearly intended to provide policyholders a remedy for when an insurer intentionally denied a claim without any grounds to do so. And they created the tort of bad faith to do that.

The Court was very careful in creating the tort for that limited situation to still give the insurer the right under the policy to debate and contest disputable claims. And so in doing so, Justice Jones said in the Vincent case – and Justice

* * *

[p. 77] MR. HART: Yes, sir. I will look at that and let you know whether I find something or don't find something. To me, the resolution would be the company is entitled to true and correct information to the questions given. And where the application on its face does not show any falsehood or inconsistency, they don't have to go behind and turn over every rock and look for things.

THE COURT: Well, the question I have is what answer, what information has to be given to the insurance company in answer to every question? Has any member of your family ever had a loss? Assuming that the prospective insured is defending on the basis, well, I didn't know Uncle Charlie had a loss, how far are you going to go?

The question – if they want to know whether you've had a loss, what your position is, the question should be asked of you. If you're going to ask a general question, has anyone in your family ever made a claim for a fire loss, even though the person may know it, they say, yeah, I know Uncle Charlie had a fire loss but I'm not going to tell them about it, and the individual intentionally doesn't say anything about Uncle Charlie's fire loss, there's got to be some effect on it. And it has to affect it on the basis of the fire loss.

Now, that may not be apropos. But I'm saying to you that I would like to have some case law on this particular aspect because it concerns me insofar as the nonrenewal.

[p. 78] Let me ask Mr. Jackson some questions. I think I've called to the Defendant's attention some issues that I have. Mr. Jackson, one of the problems that I have here – and this is a substantial question that I've wrestled with, I guess, during the trial of the case and I am still wrestling with and I still have not come to any decision.

I recognize that in certain cases, there is an area where if the bad faith activity is based on whether you believe or disbelieve the insured or an agent of the insurance company, that in those certain areas, certain issues, that is a question for the jury. For instance, where the insurance adjustor says that he has talked to the insured and the insured told him the loss occurred this way or that way and the insured denies that, now there is an issue that is a question for the jury to decide.

But the problem that I have in this case is although I'm not impressed with the Defendant's contention that as to their motion for new trial on the agency issue because I don't think agency was ever raised by the Defendant in this case, and the Court is going to rule that way, the problem I have, though, is that the agents themselves are not involved in claims, in the handling of claims, in saying we should pay this claim or we shouldn't pay this claim.

The agency department, the adjustors, those people who are working in that particular area, it seems to me if they're [p. 79] guilty of any activity, that there is an issue before the jury as to whether or not the insured should be

believed or the adjustor or claims department should be believed, that's an issue for the jury.

But here, the agent – excuse me, the adjusting party comes in, the claims department. They went out and made an investigation. The investigation they made was with their agents who said what was said. The agents said, the lady, we asked this question, she denied that she had been nonrenewed. The lady said she did tell the – no, the question was not asked and if she had – if it had been asked, she would have told them about the nonrenewal. But the adjusting department did everything and the claims department did everything that they should have done.

If the Plaintiffs' position is the insurance or the claims department cannot take the word of their agents – and I don't think there's been any evidence offered by the Plaintiff in this case that these agents had ever done anything improper in the past. I don't believe there's any evidence that they did this is a matter of course where the insurance company would be aware of their activity. And if that be the case, I'm satisfied that that would be negligence on the part of the agency, the investigative arm of the insurance company, in finding whether or not these people should be believed.

But assuming that these are agents of the company, which we [p. 80] have done, and they ask these agents did Ms. So-and-So advise you that she was – she answered this question, and they say, yes, she did, it puts the insurance company and the claims department in a very precarious position. They cannot accept the word of anyone when there is an issue by the insured saying, I

did say this or I did not say this, and the agent is saying they did, so that the insurance company no longer can deny the claim in good faith. It puts them in a very precarious position.

And I am concerned that the insurance company in the bad faith claim here is what the, what the claims department did. The bad faith, as I would think the Plaintiff would contend, is the bad faith action of these agents who told a lie under what the jury determined. But these agents are not the ones who have a right to say we'll pay this claim or we won't pay the claim. The claims department makes that determinatiōn should this claim be made – be paid.

And what can they do to determine whether that claim can be paid? They can make an investigation. Can they – the finding of the jury and the judgment of this court, as I see it, raises this specter: The insurance company can no longer accept the word of any of its departments or any of its agents in any case where the insured disagrees with the agent or has anyone else that disagrees with the agent.

Now, I see no bad faith on the part of the claims [p. 81] department in denying the claim based on the fact that they relied on their agents. Not only did they have one agent, but the other agent said, yes, I was sitting there and I heard this conversation.

To require them to pay the claim would mean the agency – or excuse me, the claims department would have to say to the agents, we don't believe you, and even if we did believe you, we can't accept that, and from now

on if the question is asked, all the insured has to do is to refuse to pay.

The only answer that I see to any of this, Mr. Jackson, is the contention on the Plaintiffs' part that they were using a form that allowed this sort of occurrence. Assuming, Mr. Jackson, that this application was signed, would you agree that the Plaintiff would be bound by what appeared on that document?

And let's assume this set of facts: that your client was to testify, I signed that in blank. There was nothing written on it when I signed it. And now they put in that I was not canceled, and I never told them that I was not canceled. That was not filled out at the time.

Now we've got a form that has been signed by the insured. Are you saying the insured would be bound by that even though her position was that it was not filled out? And how was the claims department held in that case? Let me listen to you for a while.

Supreme Court, U.S.
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No. 96-1042

In The

Supreme Court of the United States

October Term, 1996

WENDELL M. SIMMONS and LUCY SIMMONS,

Petitioners,

vs.

SAFECO INSURANCE COMPANY OF AMERICA, INC.,

Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

J. MARK HART
Counsel of Record
OLSCHNER & HART, P.C.
8 Office Park Circle
Suite 1
P.O. Box 531228
Birmingham, Alabama 35253
(205) 879-9905

R. LARRY BRADFORD
BRADFORD & DONAHUE, P.C.
2100-A SouthBridge Parkway
Suite 585
Birmingham, Alabama 35209
(205) 871-7733

Attorneys for Respondents

70389 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

15pp

LIST OF INTERESTED PARTIES

All parties to the proceedings in the court below are listed in the caption to this petition. There are no parent companies or nonwholly owned subsidiaries of respondent Safeco Insurance Company of America, Inc.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

The Simmonses filed this action for breach of contract and the tort of bad faith denial of their insurance claim. The trial resulted in a verdict in favor of the Simmonses on both claims.

After the trial, Safeco satisfied the breach of contract judgment, so it was not at issue on appeal. Record 6-309-12; 9-1057.

As to the tort claim for bad faith, the district court granted Safeco's motion for judgment notwithstanding the verdict, setting aside the $2,000,000 punitive damages verdict. That action was affirmed by the Eleventh Circuit, and the Simmons' application for rehearing was denied.

The Simmonses never raised the issues for review alleged here until their application for rehearing in the Eleventh Circuit.

B. Factual Background.

On November 26, 1992, a home owned by Wendell Simmons burned. Record 6-263. The Simmonses made a claim under their homeowners policy with Safeco. The fire was unquestionably arson. Record 6-321, 7-570. Accordingly, Safeco began an investigation of the loss. Record 8-691.

During its claim investigation, Safeco discovered evidence that in applying for the policy the Simmonses had misrepresented or omitted material information. Record 6-298, 332-34. The misrepresentation was that the Simmons' homeowners coverage had not been non-renewed by another company within the past five years. *Id.*

Safeco's application for the policy asked, "7. Has any company canceled, declined, or refused to renew similar insurance to the insured within the past 5 years?" Record Pl. Ex. 3, 6-298, 323-34, 8-715, 749-52. The question was answered, "no." *Id.* The insurance agent testified she asked Ms. Simmons this question and accurately recorded her answer, *id.*; Ms. Simmons denied the agent asked the question, *id.* at 648.

The truth was that the Simmons' current homeowner's insurer, Southern Guaranty, had refused to renew their homeowners policy because of Lucy Simmons's bankruptcy and adverse financial standing. Record 6-298, 332-34. Had Safeco known of this adverse information, it would not have issued the policy. Record 7-467, 470, 480. Therefore, Safeco denied the claim, rescinded the policy, and refunded the premiums based on the misrepresentation of material fact concerning the non-renewal question on the application. Record 7-470.

Safeco's claim investigation included, among other things, obtaining statements from Lucy Simmons, the insurance agents, and Southern Guaranty, the Simmons' prior homeowner's carrier. Record 6-298, 332-34. The agent confirmed she had asked the questions on the application. Record 6-298, 323-34, 8-715, 749-52. Southern Guaranty confirmed it had non-renewed the Simmons' policy because of their bad credit and the bankruptcy. Record 6-298, 323-34; 8-827-29, 831.

Lucy Simmons, however, misrepresented this latter fact to Safeco in its claims investigation. The Simmonses introduced the testimony of Safeco's claim adjuster, Passomato. Passomato testified that Lucy Simmons told him they were seeking to change insurance companies because their current carrier was requiring them to erect a fence around their swimming pool, which they had chosen not to do. Record 6-294-97. Passomato's

claim note of Lucy Simmons' statement, also introduced by the Simmonses, states in part:

> *I* [Lucy Simmons] *was looking to change ins[urance] co[mpanies] because my carrier wanted me to put a fence around the pool* or they would not cover me. I spoke with Wendell & he said I have 160 acres & I'm not going to put a fence up. *So we were looking to change companies* & I was asked some questions. Age . . .
>
> She [the agent] did not ask about being cancelled or not renewed. But we did discuss the problem about the fence and that the other carrier would not cover me w/o fence.

Record Pl. Ex. 41, 6-294-99 (emphasis added).

Passomato knew Lucy Simmons's statement was false, because he had already been told by Southern Guaranty of the non-renewal for bad credit and the bankruptcy. Record 6-298, 323, 333. Moreover, Southern Guaranty had reported to Passomato that it had told Lucy Simmons the reason for Southern Guaranty's non-renewal. *Id.* The agent did not agree that Lucy Simmons had told her about any non-renewal concerning a swimming pool fence. Record 6-298, 323-34, 8-715, 749-52. Thus, Passomato had evidence that Lucy Simmons misrepresented facts to the agent in applying for the policy, and he had the direct experience of Simmons misrepresenting facts to him.

Passomato forwarded the information about the misrepresentation in the application to Safeco' underwriting

department. Record 6-334; 8-694. The underwriting department advised that no policy would have issued had Safeco known of the non-renewal by Southern Guaranty for bad credit and bankruptcy. Record 7-467. The underwriter testified, "Our experience as a company is that there is a much higher probability of loss and much more costly losses if an individual has severe credit problems." Record 7-467, 480; 8-851-52. Passomato then denied the claim because of the material misrepresentation on the application as to the non-renewal question. Record 6-289; 9-882.

REASONS FOR DENYING THE WRIT

This case involves only the question of the sufficiency of evidence for submission to the jury of plaintiffs' bad faith claim. The district court granted a judgment n.o.v., because it determined there was insufficient evidence to have submitted that claim to the jury. The case does not present an important question of federal law, nor does the decision conflict with any other decision by a court of appeals or this Court.

Contrary to the Simmons' assertions, the district court did correctly apply Alabama law, as is shown below.

I.

UNDER ALABAMA LAW A BAD FAITH CLAIM CANNOT BE SUBMITTED TO THE JURY WHEN THE INSURER HAD A DEBATABLE REASON TO DENY THE CLAIM.

The tort of bad faith is an intentional tort under Alabama substantive law. A plaintiff bears a "heavy burden" to prove a bad faith case. Alabama law recognizes that an insurer should have the right to contest questionable claims: "The reasonable

expectations of parties to an insurance contract contemplate a broad range of freedom on the part of the insurer to evaluate claims submitted thereunder and to decline payment in non-meritorious cases;" an insurer has a "freedom (and, perhaps, the duty) not to honor, and thus legally dispute, claims of questionable validity in accordance with the terms of the contract . . . ." *Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So. 2d 1054, 1063 & 1064 (Ala. 1979) (Jones, J., concurring).

A plaintiff must prove, in addition to other elements, that the insurer both (1) had no lawful basis to deny the claim and (2) knew it had no arguable basis for the refusal to pay at the time it denied the claim. *National Security Fire & Cas. Co. v. Bowen*, 417 So. 2d 179, 183 (Ala. 1982). The *Bowen* court explained:

> No lawful basis means that the insurer lacks a legitimate or arguable reason for failing to pay the claim . . . . When a claim is "fairly debatable," the insurer is entitled to debate it, whether the debate concerns a matter of fact or law.

Id. A bad faith claim is to be dismissed where there is a lawful basis:

> As a general rule, when a fact issue exists as to the validity of the insurance claim, the bad faith claim should not be submitted to the jury and summary judgment for the defendant is proper. . . . If any one of the reasons for denial of coverage is at least "arguable," [the] Court need not look any further.

Sherrin v. Northwestern Nat. Life Ins. Co., 2 F.3d 373, 380 (11th Cir. 1993) (Alabama).

The premise of the tort of bad faith is that the trial judge makes a threshold determination whether the insured has met the heavy burden of showing there was no reasonable evidence to support the insurance company's denial of the claim. If *any* reasonable evidence existed, the trial judge is to dismiss the bad faith tort claim:

> In *Bowen, supra*, we set out the elements of the tort and attempted to show the plaintiff's burden in these cases. It is a *heavy burden*. In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. *Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury.*

National Savings Life Ins. Co. v. Dutton, 419 So. 2d 1357, 1362 (Ala. 1982) (emphasis added). "[T]he 'no lawful basis' element of the tort constitutes the insurer's utter lack of any 'legitimate or arguable reason for failing to pay the claim.' " *Burns v. Motors Ins. Corp.*, 530 So. 2d 824, 827 (Ala. Civ. App. 1987).

A bad faith claim is to be dismissed where there is evidence of a lawful basis regardless of the ultimate determination at trial

on the breach of contract claim. *See, e.g., Davis v. Cotton States Mut. Ins. Co.*, 604 So. 2d 354, 360 (Ala. 1992); *Lamplighter Dinner Theatre v. Liberty Mut. Ins. Co.*, 792 F.2d 1036, 1041-42 (11th Cir. 1986) (Alabama) (summary judgment on bad faith affirmed where insurer had arguable reason for denial, even though insurer had settled and paid the policy claim).

II.

A MATERIAL MISREPRESENTATION BY THE INSURED IN APPLYING FOR THE POLICY IS A DEBATABLE REASON UNDER ALABAMA LAW.

Ala. Code § 27-14-7 (1975) authorizes an insurer to rescind a policy for material misrepresentations, concealments, or incorrect statements by the insured in applying for a policy.[1]

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1. That code section provides in pertinent part:

> (a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:
>
> (1) Fraudulent;
>
> (2) Material either to the acceptance of the risk or to the hazard assumed; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or . . . at the premium

(Cont'd)

Under Alabama law, evidence of a misrepresentation by the insured in applying for a policy is a lawful basis to deny a claim. This rule applies even when there is a factual dispute whether the insured misrepresented information to the agent. In each of the following cases, a factual disputed existed between the insured and the agent as to the reason for the misrepresentation on the application, yet the misrepresentation was held to be a debatable reason not to pay which precluded submission of the bad faith claim to the jury: *Sherrin v. Northwestern Nat. Life Ins. Co.*, 2 F.3d 373 (11th Cir. 1993) (Alabama) (insurer granted directed verdict); *American General Life & Acc. Ins. Co. v. Lyles*, 540 So. 2d 696, 699 (Ala. 1988) (reversed for failure to grant insurer a directed verdict on bad faith: "[w]hether Mr. Lyles told the agent the truth and the agent omitted the information is in dispute, but an insurer has a right to expect applicants for insurance policies to tell the truth .... Thus, it was error to submit the bad faith claim to the jury."); *Union Bankers Ins. Co. v. McMinn*, 541 So. 2d 494 (Ala. 1989) (reversed for failure to grant insurer directed verdict where application omitted health history even though there was conflicting evidence that agent may have been responsible for the omission); *National Savings Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982) (insurer entitled to directed verdict); *Old Southern Life Ins. Co. v. Spann*, 472 So. 2d 987 (Ala. 1985) (insurer due directed verdict for misrepresentation on application); *Kizziah v. Golden Rule Ins. Co.*, 536 So. 2d 943 (Ala. 1988) (summary judgment affirmed on bad faith); *McLaughlin v. Alabama Farm Bureau Mut. Cas. Co.*, 437 So. 2d 86 (Ala. 1983) (insurer due directed verdict);

(Cont'd)

> rate as applied for, or . . . in as large an amount or . . . for the hazard resulting in the loss if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

Ala. Code § 27-14-7 (1975).

Clark v. Alabama Farm Bur. Mut. Cas. Ins. Co., 465 So. 2d 1135 (Ala. Civ. App. 1984) (insurer entitled to summary judgment on bad faith claim); *National Security Fire & Cas. Co. v. Vintson*, 454 So. 2d 942 (Ala. 1984) (insurer had a lawful basis).

III.

THE EVIDENCE WAS INSUFFICIENT FOR SUBMISSION OF BAD FAITH TO THE JURY.

Safeco discovered evidence in its claims investigation that the Simmonses had misrepresented in applying for the policy that they had not been non-renewed by another insurer within the past five years. The truth was that the Simmons' existing carrier had non-renewed them because of a bankruptcy and bad credit. Had Safeco known the true facts originally, it would not have issued the policy.

At the time Safeco denied the claim, which is the material time in a bad faith claim, Safeco had evidence from independent sources that Lucy Simmons knew Southern Guaranty had non-renewed them, but she misrepresented or concealed that information from Safeco in applying for the policy. That evidence constitutes a lawful basis — a fairly debatable or arguable reason — for the claim denial, and the district court correctly granted a n.o.v. on the tort of bad faith claim. *See Sherrin*, 2 F.3d 373; *State Farm Fire & Cas. Co. v. Balmer*, 891 F.2d 874 (11th Cir. 1990) (Alabama).

The Simmons' attempt to find a federal issue is transparent. The district court correctly followed Alabama law in granting the judgment n.o.v. The court simply ruled that the evidence was insufficient under Alabama law for submission of bad faith to the jury. The writ is not to be issued merely to review a question of the sufficiency of the evidence. *General Talking*

Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938); *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951).

The district court did not base its ruling on public policy, nor did it violate the *Erie* Doctrine by refusing to apply Alabama law. This case does not satisfy the grounds for issuance of the writ under Supreme Court Rule 10, and the petition should be summarily denied. *See, e.g., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

J. MARK HART
Counsel of Record
OLSCHNER & HART, P.C.
8 Office Park Circle
Suite 1
Birmingham, Alabama 35253
(205) 879-9905

R. LARRY BRADFORD
BRADFORD & DONAHUE, P.C.
2100-A SouthBridge Parkway,
Suite 585
Birmingham, Alabama 35209
(205) 871-7733

Attorneys for Respondents